

**LODI CITY COUNCIL
SHIRTSLEEVE SESSION
CARNEGIE FORUM, 305 WEST PINE STREET
TUESDAY, FEBRUARY 15, 2011**

A. Roll Call by City Clerk

An Informal Informational Meeting ("Shirtsleeve" Session) of the Lodi City Council was held Tuesday, February 15, 2011, commencing at 7:00 a.m.

Present: Council Member Hansen, Council Member Katzakian, Council Member Nakanishi, Mayor Pro Tempore Mounce, and Mayor Johnson

Absent: None

Also Present: City Manager Bartlam, City Attorney Schwabauer, and City Clerk Johl

B. Topic(s)

B-1 Provide Direction to City Attorney Regarding Drafting Ordinance Prohibiting Smoking Near Entrances, Windows, and Air Inlets to Private Buildings (CA)

City Attorney Schwabauer provided an overview of the potential of drafting an ordinance that prohibits smoking near entrances, windows, and air inlets to private buildings as set forth in the staff report. Specific topics of discussion included citizen inquiry regarding neighbors smoking next to a window near a private entrance, existing laws regarding smoking within 20 feet near a public building, model ordinance dealing with outdoor smoking, and similar ordinances in other cities that focus on outdoor events and recreational facilities.

In response to Mayor Pro Tempore Mounce, Mr. Schwabauer reviewed a list of cities, as set forth in the staff report, that currently have ordinances prohibiting smoking in various areas.

In response to Mayor Pro Tempore Mounce, Mr. Schwabauer stated if the Council was to pursue an ordinance prohibiting smoking within 20 feet of private entrances, exceptions could be carved out for dining and wine and bar establishments.

In response to Council Member Katzakian, Mr. Schwabauer stated currently the City has no restrictions other than public places, which is also state law.

In response to Mayor Pro Tempore Mounce, Mr. Schwabauer stated that, while there may be some complaint enforcement at the beginning through the Police Department, for the most part these types of ordinances are self-enforcing based on societal pressure.

A brief discussion ensued amongst the City Council regarding second hand smoke, restrictions on freedom for those who do and do not smoke, and the effectiveness of posting no smoking signs.

In response to Council Member Hansen, Mr. Schwabauer stated currently a business owner is only cited if it looks like they are actively encouraging smoking and not if they are making a good faith effort to prevent smoking.

In response to Mayor Johnson, Mr. Schwabauer stated the workspace means an outdoor workplace, such as a construction site, where people are assigned to work.

In response to Mayor Johnson, Mr. Schwabauer stated a sidewalk is any public sidewalk within the City.

In response to Council Member Katzakian, Mr. Schwabauer stated smoking restrictions could be placed into covenants and restrictions for a homeowner's association if everyone agreed or when leases expire for a commercial complex.

In response to Mayor Johnson, Mr. Schwabauer stated if an ordinance was considered there would be a public hearing and additional notice and workshops could also be considered.

Randy Snider spoke in favor of drafting an ordinance prohibiting smoking near private building entrances based on recent complaints his management company has received from tenants, his past experience with the citizen initiative that prohibited smoking near public building entrances, and the ineffectiveness of letters and no smoking signs.

Ed Miller spoke in opposition to drafting an ordinance based on his concerns that cigarettes are legal, too much regulation on personal freedoms, and unfunded mandates for business owners.

Myrna Wetzel spoke in support of drafting an ordinance prohibiting smoking near private entrance ways based on her concerns about second and third hand smoke and the unpleasant smell of the smoke for passersby.

Tony Amador spoke in favor of drafting an ordinance that is as restrictive as possible under the law based on his concerns about the health and welfare of citizens subject to second hand smoke.

The City Council provided general direction to draft an ordinance prohibiting smoking near entrances for private buildings along with a menu of other prohibition options for the Council to consider.

C. Comments by Public on Non-Agenda Items

None.

D. Adjournment

No action was taken by the City Council. The meeting was adjourned at 7:45 a.m.

ATTEST:

Randi Johl
City Clerk



**CITY OF LODI
COUNCIL COMMUNICATION**

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AGENDA TITLE: Provide Direction to City Attorney Regarding Drafting Ordinance Prohibiting Smoking Near Entrances, Windows and Air Inlets to Private Buildings.

MEETING DATE: February 15, 2011 Shirtsleeve

PREPARED BY: City Attorney'

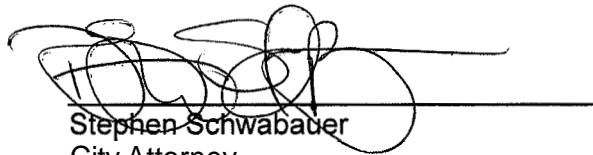
RECOMMENDED ACTION: Provide direction to City Attorney regarding drafting ordinance prohibiting smoking near entrances, windows and air inlets to private buildings.

BACKGROUND INFORMATION: A member of the public requested the Mayor to consider an anti-smoking rule for private entryways. State law prohibits smoking in all places of employment and within 20 feet from entrances of public buildings. The place of employment prohibition does not have an accompanying 20-foot from entry way prohibition. However a number of municipalities have added the limit by ordinance. Mayor Johnson has indicated he would like to hear the ordinance.

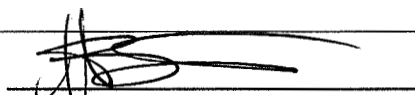
Attached is a policy paper from the Center for Tobacco Policy on comprehensive Tobacco ordinances and a policy paper and model ordinance from the Technical Assistance Legal Center. The first is a comprehensive outdoor ordinance and the second is a multi-unit residential ordinance that could be adjusted to address air entry points only.

FISCAL IMPACT: Not applicable.

FUNDING AVAILABLE: Not applicable.


Stephen Schwabauer
City Attorney

APPROVED:


Konradt Bartlam, City Manager



COMPREHENSIVE OUTDOOR SECONDHAND SMOKE ORDINANCES

October 2010

Many cities and counties in California are working to protect their residents from the dangers of secondhand smoke exposure by passing ordinances that restrict smoking in outdoor areas, especially in places where people congregate. In fact, many cities and counties are passing ordinances that are comprehensive in scope and include protections in many areas of the community, from city parks to building entryways to ATM lines. This document examines the most wide-ranging of these ordinances to provide a clear picture of comprehensive outdoor smoking bans in California and to assist local advocates in their efforts to get more communities to adopt such policies.

THE NEED FOR COMPREHENSIVE OUTDOOR SECONDHAND SMOKE ORDINANCES

There is no question that secondhand smoke is harmful to individuals. The California Air Resources Board declared secondhand smoke a toxic air contaminant in January 2006 and the U.S. Surgeon General stated that there is no risk-free level of exposure to secondhand smoke in June 2006. A recent study conducted by researchers with Stanford University further shows the public health need for restricting smoking in outdoor areas.* This research measured air pollution levels at outdoor places, such as dining areas and parks, where people were smoking and found that levels of exposure to secondhand smoke outdoors can be comparable to secondhand smoke exposure indoors. In addition, when an individual is near a smoker outdoors, they are exposed to air pollution levels significantly higher than normal background air pollution levels. Finally, the study indicates that there is a compelling health basis for outdoor smoking bans in commercial and non-commercial settings.

In addition to the health risks associated with outdoor smoking, there are other reasons to restrict smoking in certain outdoor areas. Cigarette butts are the number one litter item found along beaches. Cigarette litter damages the environment and poses a hazard to children, pets and wildlife that may pick up or swallow these cigarette butts. Recreation areas suffer from cigarette trash but also from the risk of fire. In May 2007, a fire started by a discarded cigarette butt in Griffith Park in Los Angeles burned over 800 acres.

*Klepeis NE, Ott WR, Switzer P (2007) Real-time measurement of outdoor tobacco smoke particles. Journal of the Air and Waste Management Association, 57:522-534.

WHAT MAKES A COMPREHENSIVE ORDINANCE?

Smoking can be restricted in any outdoor area, but there are seven outdoor areas that comprehensive ordinances most commonly target. To be classified in this document as a comprehensive outdoor secondhand smoke ordinance, the ordinance must include smoking prohibitions in at least five of the seven major outdoor areas. The restrictions in these areas must go beyond any state laws that restrict smoking in these areas. For example, state law prohibits smoking within 20 feet of entrances and exits to city, county and state buildings so a local ordinance must go beyond that restriction to restrict smoking in the entryways of other buildings. The seven areas are:

1. Dining Areas – defined as outdoor seating at restaurants, bars, etc.
2. Entryways – defined as within a certain distance of doors, windows, and other openings into enclosed areas
3. Public Events – defined as farmer's markets, fairs, concerts, etc.
4. Recreation Areas – defined as parks, beaches, trails, sports fields, etc.
5. Service Areas – defined as bus stops, ATM lines, ticket lines, taxi stands, etc.
6. Sidewalks – defined as public sidewalks, such as sidewalks around downtown shopping and business areas
7. Worksites – defined as any outdoor working area, such as construction areas

Thirty-seven cities and counties in California have passed comprehensive outdoor secondhand smoke ordinances. The full list of 37 jurisdictions is available in a table on pages 4-5 that outlines the different areas where each ordinance restricts smoking.

COMPREHENSIVE ORDINANCES: TWO APPROACHES FOR SUCCESS

There are two approaches for a comprehensive outdoor secondhand smoke ordinance. The first approach, or **inclusive approach**, is an ordinance that bans smoking in all public places in the community. Calabasas, El Cajon and Loma Linda have adopted this type of ordinance. The second approach, the **listing approach**, specifies the outdoor places where smoking is prohibited. The other communities follow the listing approach.

The ordinances adopted in Calabasas, El Cajon and Loma Linda stand out from the other ordinances because they are more far-reaching and use the inclusive approach to restrict smoking in all outdoor public places rather than just listing specific places where smoking is banned. In these three cities, smoking is prohibited in all public places, which is defined as any public or private place that is open to the general public. All seven of the major outdoor areas (dining areas, entryways, public events, recreation areas, service areas, sidewalks, and worksites) are covered by these ordinances, as are other public places such as parking lots. These three cities set the standard for comprehensive smokefree outdoor areas by providing their residents protection from secondhand smoke exposure in all outdoor public places.

Many other cities and counties have comprehensive outdoor secondhand smoke ordinances that also provide much needed protection from secondhand smoke exposure to their residents. These communities use the listing approach to provide this protection. Instead of prohibiting smoking in all public places, these ordinances follow the approach that specifically lists the places where smoking is prohibited. This model provides the same type of protection from secondhand smoke as the inclusive approach, but just in fewer locations. However, it should be noted that some of the ordinances using the listing approach are so comprehensive in the areas that they list, that they end up prohibiting smoking in as many areas as the ordinances using the inclusive approach.

A benefit of the listing approach is that it allows for more flexibility in terms of where smoking can be prohibited. If there is not the political will to ban smoking in all public places, the listing approach offers a way to draft a comprehensive ordinance that provides an opportunity to reach compromises that may be necessary to pass the ordinance. Conversely, if a community is only working on restricting smoking in one type of outdoor area, this approach provides an easy way to expand the policy into a comprehensive ordinance if an opportunity presents itself.

PUBLIC SUPPORT FOR COMPREHENSIVE ORDINANCES

The Center commissioned two public opinion surveys that featured questions about comprehensive ordinances and both show strong public support for these laws. In November 2008, the Center commissioned a survey of California voters about secondhand smoke policies and found that 73% of California voters support a comprehensive law that prohibits smoking in all outdoor areas accessible to the public, except for designated smoking areas. In March 2007, the Center commissioned a survey of Calabasas voters one year after the city's comprehensive ordinance went into effect. The results show that 80% of Calabasas voters approve of the law and 74% think the law is an appropriate way to protect people from secondhand smoke. Both surveys were conducted by Goodwin Simon Victoria Research and survey results and summary documents are available at www.Center4TobaccoPolicy.org/polling.

IMPLEMENTATION

Because these ordinances are designed to be self-enforcing, it is important for the city or county to properly implement the ordinance with an education campaign to make the public aware of the locations where smoking is prohibited. A good implementation plan can include several different elements depending on city/county resources, including signage, publications, websites, dedicated staff and a campaign theme. While every jurisdiction may not include all of these elements, it is important to include as many as possible to ensure that the ordinance is effective at prohibiting smoking in these outdoor areas. Below are descriptions and examples for each of these elements:

Signage – “No smoking” signs make it clear to the public where smoking is prohibited and empowers people to ask someone to stop smoking. The signs in Calabasas clearly designate which outdoor areas are smokefree, while Martinez has signs that clearly state the entryway smoking restrictions.

Publications – Materials such as brochures, Frequently Asked Questions (FAQs) and window decals are useful for providing to businesses so that they can comply with the new law. San Luis Obispo has a brochure with a good summary and Baldwin Park has FAQs available in both English and Spanish.

Websites – A useful way to reach a broad audience is to dedicate a section of the jurisdiction's website for information on the ordinance. Camarillo's website has clear outlines on where smoking is prohibited and allowed, FAQs and downloadable materials for businesses.

Dedicated Staff – Some cities have designated a specific staff person to work on educating businesses and the public. Glendale hired a Fresh Air Program Ambassador to meet with any residents or merchants who have questions about the secondhand smoke ordinance.

Campaign Theme – Developing a theme for the ordinance can help a jurisdiction tie all of the implementation elements together and frame the new ordinance around the issue of clean air and protecting health. Calabasas developed the theme Clean Air Calabasas creating a logo and identity for their implementation.

ENFORCEMENT

Comprehensive outdoor smoking ordinances are designed to be self-enforcing. When communities pass these types of policies, they do not intend for police officers to spend their time searching for people smoking in public places. Rather, the expectation is that through education and signage, residents will become aware of the smoking restrictions and most individuals who smoke will obey the law. If someone does smoke in a restricted area, other people are likely to ask that individual to stop and inform him/her of the smoking restrictions.

Despite the reliance on self-enforcement, all of these ordinances have some provisions that allow the city to enforce the ordinance if needed. For example, all the ordinances detail how violators of the ordinance can be punished. Cities and counties have made violations of their outdoor smoking ban punishable as a misdemeanor, infraction or both. Some ordinances even specify the amount that violators can be fined, often several hundred dollars.

Another enforcement element found in most of these ordinances is the designation of an enforcement agency for the smoking prohibitions. Examples of the individuals and departments that have been designated as enforcement agencies in one or more of the ordinances include police officers, code enforcement officers, city attorneys, city prosecutors, city managers, the fire department, health and human services department, environmental health department and parks department. An innovative way to report violations to the enforcement agency has been set up in Pasadena. The city has an Online Violations Report Form where individuals can report violations of tobacco control laws and the city will investigate within one business day.

A final enforcement provision found in some of the ordinances is private enforcement. This enforcement option empowers an individual to enforce the non-smoking prohibition by bringing a civil action in court against a violator and suing for damages that were caused by violations of the ordinance.

OTHER RESOURCES

The Center has other resources on comprehensive outdoor secondhand smoke ordinances available on our website at www.Center4TobaccoPolicy.org/localpolicies-outdoorareas. For sample language on drafting a comprehensive outdoor smoking ordinance, please visit the Technical Assistance Legal Center's (TALC) website at <http://www.phlpnet.org>.

TABLE OF COMPREHENSIVE OUTDOOR SECONDHAND SMOKE ORDINANCES

The 37 cities and counties in California with comprehensive ordinances are listed below, which details each outdoor area where a community prohibits smoking in its ordinance. When there are limitations or exceptions to completely prohibiting smoking in the seven outdoor areas, it is noted with a footnote.

CITY / COUNTY	OUTDOOR AREA WHERE SMOKING IS PROHIBITED						
	Dining Areas	Entryways	Public Events	Areas	Service Areas	Sidewalks	WORKSITES
Sebastopol August 2010	X	X	X	X	X		X
Eureka July 2010	X	X	X	X	X	X*	X
San Luis Obispo April 2010	X*	X	X	X	X	X	X
Camarillo April 2010	X	X	X	X	X	X*	X
Pinole April 2010	X	X	X	X	X		
Santa Barbara County April 2010	X*	X	X*	X	X		
San Francisco March 2010	X*	X*	X*	X	X		
San Leandro December 2009	X	X	X	X	X		X
Del Mar December 2009	X	X	X	X	X	X	X
Moorpark September 2009	X	X	X*	X	X	X	X
Richmond June 2009	X	X	X	X	X		
Martinez April 2009	X	X	X	X	X		X
Pasadena October 2008	X	X	X	X	X		
Glendale October 2008	X*	X	X	X	X		X
Dublin October 2008	X	X	X*	X*	X		
Thousand Oaks July 2008	X*	X	X*	X*	X		
Loma Linda June 2008	X	X	X	X	X	X	X
Albany May 2008	X*	X	X	X	X	X*	X
Hayward May 2008	X	X	X*	X	X	X	

continued on the next page

*Eureka – sidewalk prohibitions only apply to Eureka boardwalk

*San Luis Obispo – allows designated smoking areas that meet certain criteria in outdoor seating of bars that do not serve food

*Camarillo – only applies to sidewalks designated by city resolution

*Santa Barbara County – allows exemptions for smoking to be allowed at free standing bars and 25% of outdoor seating at restaurants

*Santa Barbara County – only applies to outdoor concerts, sporting events, plays and similar performances

*San Francisco – for outdoor dining areas of bars, the ordinance only restricts smoking within 10 feet of entrances and windows

*San Francisco – for building entrances, exits and windows, smoking is allowed at the curb outside the building or if there is no curb, smoking is prohibited within 15 feet

*San Francisco – only specifically prohibits smoking at farmer's markets, but smoking is also prohibited at public events that are held in other locations where smoking is prohibited, such as in parks

*Moorpark – allows exceptions for an outdoor special event subject to approval by the community development director

*Glendale – allows for creation of designated smoking section in outdoor dining

*Dublin – allows for creation of designated smoking areas at public events

*Dublin – recreation areas does not include community parks

*Thousand Oaks – allows restaurants to apply for a permit for a designated outdoor kitchen if certain conditions are met

*Thousand Oaks – allows for creation of designated smoking areas at public events

*Thousand Oaks – smoking prohibitions only apply to recreation areas under the city's jurisdiction; city parks are under a separate jurisdiction

*Albany – allows exceptions for permitting smoking in outdoor areas at stand-alone bars if certain conditions are met

*Albany – only prohibits smoking on sidewalks adjacent to school property and sidewalks on Solano Avenue between San Pablo Avenue and the City of Berkeley jurisdictional border

*Hayward – allows for creation of designated smoking areas at public events

TABLE OF COMPREHENSIVE OUTDOOR SECONDHAND SMOKE ORDINANCES (continued)

CITY / COUNTY	OUTDOOR AREA WHERE SMOKING IS PROHIBITED						
	Dining Areas	Entryways	Public Events	Recreation Areas	Service Areas	Sidewalks	Worksites
Novato April 2008	X*	X	X	X	X		X
Berkeley December 2007	X	X		X	X	X*	X
Ross December 2007	X	X	X	X	X		
Belmont October 2007	X	X	X	X	X		X
El Cajon August 2007	X	X	X	X	X	X	X
Blue Lake June 2007	X*	X	X*	X	X		
Temecula May 2007	X	X	X	X	X		X
Burbank April 2007	X*	X	X	X*	X*	X*	
Baldwin Park February 2007	X	X	X*	X	X		
Emeryville December 2006	X	X	X	X	X		
Laguna Woods November 2006	X*	X	X	X	X		
Marin County November 2006	X*	X	X	X	X		X
Contra Costa County October 2006	X	X	X	X	X		
Santa Monica October 2006	X	X	X*	X	X	X*	
Mammoth Lakes June 2006	X	X	X	X	X		X
Santa Rosa June 2006	X	X	X	X	X*	X*	
Calabasas February 2006	X	X	X	X	X	X	X
Davis March 1993	X	X	X	X*	X		

*Novato – allows exceptions for permitting smoking in outdoor areas at stand-alone bars if certain conditions are met

*Berkeley – only prohibits smoking on sidewalks in commercial areas

*Blue Lake – allows exemptions for smoking to be allowed at bars

*Blue Lake – allows for designated smoking areas at public events

*Burbank – allows restaurants to apply for a designated outdoor smoking section that can cover up to 40% of dining area

*Burbank – allows for creation of designated smoking areas in recreation areas

*Burbank – service areas prohibition does not include individual bus stops in public rights-of-way

*Burbank – only prohibits smoking on sidewalks in downtown Burbank

*Baldwin Park – only prohibits smoking at farmer's markets

*Laguna Woods – only applies to restaurants, not bars

*Marin County – allows exceptions for permitting smoking at outdoor dining at bars if certain conditions are met

*Santa Monica – only prohibits smoking at farmer's markets

*Santa Monica – only applies to sidewalks at the Third Street Promenade

*Santa Rosa – service areas prohibition only includes downtown transit mall

*Santa Rosa – only applies to sidewalks at Comstock mall and Jeju Way

*Davis – only applies to open space areas that are used for recreation



public health law & policy
technical assistance legal center

Comprehensive Secondhand Smoke Model Ordinance for California Communities (with Annotations)

Revised December 2006
(Originally issued October 2003)

Developed by the Technical Assistance Legal Center (TALC),
a project of Public Health Law & Policy.

This material was made possible by funds received from the
California Department of Public Health, under contract #04-35336.

Public Health Law & Policy is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

www.phlpnet.org • talc@phlpnet.org • (510) 302-3380

INTRODUCTION

The Technical Assistance Legal Center (TALC) drafted this model ordinance to help California cities and counties that wish to limit exposure to secondhand smoke in public places.¹

As the dangers of secondhand tobacco smoke become increasingly well documented, one of the most important steps a community can take to improve the health of its residents is to create more smoke-free spaces. The U.S. Environment Protection Agency has identified secondhand smoke as a Type A carcinogen—the most dangerous class of carcinogen, for which there is no safe level of exposure—and the California Air Resources Board has classified secondhand smoke as a toxic air contaminant. Despite California's prohibition on smoking in most workplaces, the physical and monetary costs of exposure to secondhand smoke continue to be enormous. Local ordinances limiting exposure to secondhand smoke are the most direct and effective way to improve the public's health.

To assist cities and counties in creating smoke-free communities, the model ordinance consists of the following:

- Extensive findings based on the latest statistical and scientific information documenting the dangers and impact of secondhand smoke;
- Prohibitions on smoking in enclosed workplaces that are not covered by the state smoke-free workplace law;
- Prohibitions on smoking in many outdoor places frequented by the public, like public parks, recreation areas, and restaurant patios;
- A prohibition on smoking in the enclosed and unenclosed common areas of multi-unit residences;
- A prohibition on smoking within twenty feet of places where smoking is already prohibited;
- Requirements for clear signs to be posted in smoke-free areas; and
- Options for individuals and organizations to enforce the provisions of the ordinance in small claims court.

This version of the model ordinance contains annotations to the legal provisions with comments describing the provisions in lay language and providing additional information to municipal attorneys. In some instances alternate language is offered or blanks have been left for customization to fit the needs of a specific community. Options and exceptions to the general provision are placed in brackets. Some degree of customization will be necessary in order to correlate the provisions of the ordinance to local municipal code.

If you have questions about how to adapt this ordinance for your community, please contact TALC for assistance.

¹ TALC has developed model ordinances on other tobacco issues, such as regulating the location of tobacco retailers and regulating smoking in multi-unit housing. For copies of TALC publications or questions about this ordinance, please contact TALC at (510) 302-3380 or by e-mail: talc@phlpnet.org. Additionally, all materials are available on our website at www.phlpnet.org.

**AN ORDINANCE OF THE [CITY / COUNTY OF ____] PROHIBITING THE USE OF
TOBACCO PRODUCTS IN OR AROUND WORKPLACES AND PUBLIC PLACES
AND AMENDING THE [____] MUNICIPAL CODE**

The [City Council / County Board of Supervisors] of the [City / County of ____] does ordain as follows:

SECTION I. FINDINGS.

The [City Council / County Board of Supervisors] of [____] hereby finds and declares as follows:

WHEREAS, scientific studies have concluded that cigarette smoking causes chronic lung disease, coronary heart disease, stroke, cancer of the lungs, larynx, esophagus, mouth, and bladder, and contributes to cancer of the cervix, pancreas, and kidneys;² and

WHEREAS, more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death;³ and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide: and

WHEREAS, the U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke and neither separating smokers from nonsmokers nor installing ventilation systems effectively eliminates secondhand smoke;⁵ and

WHEREAS, the United States Environmental Protection Agency (EPA) has found secondhand smoke to be a risk to public health, and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen;⁶ and

² U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://\;www.cdc.gov/tobacco/overview/oshag.pdf> (last accessed August 15, 2003).

³ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Highlights Annual Smoking – Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999* (2002) MORBIDITY AND MORTALITY WEEKLY REPORT, available at http://www.cdc.gov/tobacco/research_data/economics/mmwr5114.highlights.htm (last accessed August 15, 2003).

⁴ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Reducing Tobacco Use: A Report of the Surgeon General*, 437 (2001).

⁵ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), available at <http://\;www.surgeongeneral.gov/library/secondhandsmoke/report/chapter.pdf> (last accessed Sept. 19, 2006).

⁶ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001), available at http://www.cdc.gov/tobacco/sgr/sgr_2000/factsheets/factsheet_clean.htm (last accessed Apr. 23, 2003).

WHEREAS, the California Air Resources Board has put secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant;⁷ and

WHEREAS, the California Office of Environmental Health Hazard Assessment has included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm;⁸ and

WHEREAS, exposure to secondhand smoke is the third leading cause of preventable death in this country, killing over 52,000 non-smokers each year,⁹ including 3,000 deaths from lung cancer;¹⁰ and

WHEREAS, secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight, and increased risk of Sudden Infant Death Syndrome (SIDS) in infants of mothers who smoke;¹¹ and

WHEREAS, secondhand smoke exposure causes as many as 300,000 children in the United States to suffer from lower respiratory tract infections, such as pneumonia and bronchitis,¹² exacerbates childhood asthma, and increases the risk of acute chronic middle ear infection in children;¹³ and

WHEREAS, the total cost of smoking in California was estimated to be \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;¹⁴ and

WHEREAS, the medical and economic costs to nonsmokers suffering from lung cancer or heart disease caused by secondhand smoke are nearly \$6 billion per year in the United States;¹⁵

⁷ Cal. Air Resources Bd., Resolution **06-01**, at **5** (Jan. **26, 2006**), available at <http://wurw.arb.ca.gov/regact/ets2006/res0601.pdf> (last accessed Sept. **19, 2006**).

⁸ Cal. Env'tl. Prot. Agency, Office of Env'tl. Health Hazard Assessment, *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity* **17**, (Aug. **11, 2006**), available at http://www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf (last accessed Sept. **19, 2006**).

⁹ S.A. Glantz & W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, **83**(1) *Circulation* 1 (1991) and California Environmental Protection Agency, Office of Env'tl. Health Hazard Management, *Health Effects of Exposure to Environmental Tobacco Smoke: Final Report* (1997).

¹⁰ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death* **2002, 2** (2002), available at <http://wurw.cdc.gov/tobacco/overview/oshag.pdf> (last accessed August **15, 2003**).

¹¹ Cal. Env'tl. Prot. Agency, Office of Env'tl. Health Hazard Assessment, *Health Effects of Exposure to Environmental Tobacco Smoke, Final Report* ES-5 (1997).

¹² U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death* **2002, 2** (2002), available at <http://www.cdc.gov/tobacco/overview/oshag.pdf> (last accessed August **15, 2003**).

¹³ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001), available at http://www.cdc.gov/tobacco/sgr/sgr_2000/factsheets/factsheet_clean.htm (last accessed Apr. **23, 2003**).

¹⁴ Max W. Rice DP, Zhang X, Sung H-Y, Miller L., *The Cost of Smoking in California, 1999*; California Department of Health Services (2002).

¹⁵ American Academy of Actuaries, *Costs Associated with Secondhand Smoke*, October, **2006**, available at

WHEREAS, almost 90% of adult smokers started smoking at or before age 18;¹⁶ and

WHEREAS, it is estimated that 13.2% of California high school students smoke¹⁷ and [number / percentage] youth residing in [your region] smoke; and

WHEREAS, with certain exceptions, state law prohibits smoking inside an enclosed place of employment;¹⁸ and

WHEREAS, state law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees;¹⁹ and

WHEREAS, state law prohibits smoking in playgrounds and tot lots and within twenty feet of the main entrances and exits of public buildings while expressly authorizing local communities to enact additional restrictions;²⁰ and

NOW THEREFORE, it is the intent of the [City Council / County Board of Supervisors] in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of tobacco use around non-tobacco users; by protecting children from exposure to smoking and tobacco while they play; by reducing the potential for children to associate smoking and tobacco with a healthy lifestyle; by protecting the public from smoking and tobacco-related litter and pollution; and by affirming and promoting the family atmosphere of the [City's / County's] public places.

SECTION II. [Article / Section] of the [City / County of ____] Municipal Code is hereby amended to read as follows:

Sec. [____ (*1)]. DEFINITIONS. For the purposes of this [article / chapter] the following definitions shall govern unless the context clearly requires otherwise:

(a) “Business” means any sole proprietorship, partnership, joint venture, corporation, association, or other entity formed for profit-making purposes or that has an Employee, as defined in this section.

(b) “Dining Area” means any area available to or customarily used by the general public, that is designed, established, or regularly used for consuming food or drink.

(c) “Employee” means any person who is employed; retained as an independent

http://www.actuary.org/pdf/health/smoking_oct06.pdf (last accessed October 11, 2006).

¹⁶ National Household Surveys on Drug Abuse, unpublished data, 1998. See also, U.S. Dep’t of Health & Human Servs. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, 101 (1994).

¹⁷ Tobacco Control Section, Cal. Dep’t of Health Servs., *Youth Smoking* (November 2005), at <http://www.dhs.ca.gov/tobacco/documents/pubsNouthSmoking.pdf> (last accessed November 7, 2006).

¹⁸ Cal. Lab. Code § 6404.5 (West 2003).

¹⁹ Cal. Educ. Code § 48901(a) (West 2003).

²⁰ Cal. Health & Safety Code § 104495 (West 2003) and Cal. Gov’t Code § 7596 (effective January 1, 2004).

contractor by any Employer, as defined in this section; or any person who volunteers his or her services for an Employer, association, nonprofit, or volunteer entity.

COMMENT: This definition makes clear that volunteers and independent contractors are considered Employees for purposes of this section.

(d) “Employer” means any person, partnership, corporation, association, nonprofit or other entity who employs or retains the service of one or more persons, or supervises volunteers.

(e) “Enclosed” means:

(1) any covered or partially covered space having more than 50% of its perimeter area walled in or otherwise closed to the outside such as, for example, a covered porch with more than two walls; or

(2) any space open to the sky (hereinafter “uncovered”) having more than 75% of its perimeter area walled in or otherwise closed to the outside such as, for example, a courtyard;

(3) except that an uncovered space of three thousand (3000) square feet or more is not Enclosed, such as, for example, a field in an open-air arena.

COMMENT: This definition goes beyond state law and better reflects the fact that two or more walls with a roof or four walls without a roof can still prevent smoke from venting. It is designed so that compliance can be empirically measured in every situation, and the percentages listed can be changed to fit a community's desire to limit smoking in areas with reduced air circulation. The exception for larger unenclosed places reflects the fact that the danger from secondhand smoke is greatest in smaller spaces where there is no breeze to disperse the smoke. As an alternative, a broad definition of “public place” could cover many of the same places this definition covers.

(f) “Multi-Unit Residence” means a building or portion thereof that contains more than one dwelling space consisting of essentially complete independent living facilities for one or more persons, including, for example, permanent provisions for living, sleeping, eating, cooking, and sanitation. [A single-family house shared by roommates is not Multi-Unit Residences for purposes of this section.]

(g) “Multi-Unit Residence Common Area” means any indoor or outdoor common area of a Multi-Unit Residence accessible to and usable by more than one residence, including but not limited to halls, lobbies, laundry rooms, outdoor eating areas, play areas and swimming pools.

COMMENT: This definition does not include balconies of individual units.

(h) “Nonprofit Entity” means any entity that meets the requirements of California Corporations Code section 5003 as well as any corporation, unincorporated association or other entity created for charitable, religious, philanthropic, educational, political, social or similar purposes, the net proceeds of which are committed to the promotion of the objectives or purposes of the entity and not to private gain. A public agency is not a nonprofit entity within the meaning of this section.

COMMENT: This definition is broader than the IRS designation of a nonprofit organization in order to cover more informal groups and associations.

(i) “Place of Employment” means any area under the legal or de facto control of an Employer, Business or Nonprofit Entity that an Employee or the general public may have cause to enter in the normal course of operations, but regardless of the hours of operation, including, for example, indoor and outdoor work areas, construction sites, vehicles used in employment or for business purposes, taxis, employee lounges, conference and banquet rooms, bingo and gaming facilities, long-term health facilities, warehouses, and private residences that are used as child care or health care facilities subject to licensing requirements.

COMMENT: Most of the enumerated exceptions in Labor Code section 6404.5(d) are listed here as examples of places that would be designated as nonsmoking in this Model Ordinance. Theatrical production sites (LC 6404.5(d)(9)), medical research or treatment sites (LC 6404.5(d)(10)), and most private residences (LC 6404.5(d)(11)) are exceptions under state law and remain exceptions in this model. Note that while state law prohibits smoking in private residences *when* used as day care facilities, this language prohibits smoking in private residences *if* used as day care facilities. In other words, smoking would be prohibited at all times in private residences used as **daycare** facilities, no matter whether children are present.

(j) “Playground” means any park or recreational area designed in part to be used by children that has play or sports equipment installed or has been designated or landscaped for play or sports activities, or any similar facility located on public or private school grounds, or on [City / County] grounds.

COMMENT: The phrase “has been landscaped for play or sports activities” makes this broader than the state law that prohibits smoking in playgrounds by including playing fields.

(k) “Public Place” means any place, public or private, open to the general public regardless of any fee or age requirement, including, for example, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, and buses.

COMMENT: This is a very broad definition of “public place.” As currently written, it covers almost everything

(including sidewalks and streets) except some private property. Some communities will not want to prohibit smoking so broadly. In such cases, a practical approach may be to delete this definition and, in the prohibition section below, list only those places where smoking is to be prohibited. Of course, the extent of protection would be reduced, as would the simplicity of the ordinance. Communities interested in modifying this definition are encouraged to call TALC at 510-444-8252 for assistance in drafting alternative language.

(l) “Reasonable Distance” means a distance that ensures that occupants of an area in which smoking is prohibited are not exposed to secondhand smoke created by smokers outside the area. This distance shall be a minimum of twenty (20) feet.

(m) “Recreational Area” means any area, public or private, open to the public for recreational purposes regardless of any fee requirement, including, for example, parks, gardens, sporting facilities, stadiums, and playgrounds.

COMMENT: As written, this definition is quite broad and would include the play area of a fast food restaurant. It could be narrowed, for example, by limiting it to public areas, instead of both public and private areas.

(n) “Service Area” means any area designed to be or regularly used by one or more persons to receive or wait to receive a service, enter a public place, or make a transaction whether or not such service includes the exchange of money including, for example, ATMs, bank teller windows, telephones, ticket lines, bus stops, and cab stands.

(o) “Significant Tobacco Retailer” means any tobacco retailer that derives seventy-five percent (75%) or more of gross sales receipts from the sale or exchange of tobacco products and tobacco paraphernalia.

(p) “Smoking” means possessing a lighted pipe, lighted cigar, or lighted cigarette of any kind, or the lighting of a pipe, cigar, or cigarette of any kind, including, but not limited to, tobacco, or any other weed or plant.

COMMENT: This definition would include marijuana, even if smoked for medicinal purposes. The prohibition can be limited to tobacco by eliminating the phrase “including, but not limited to, tobacco, or any other weed or plant” and adding in its place the words “containing tobacco.”

(q) “Tobacco Product” means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco.

Sec. [____ (*2)]. PROHIBITION OF SMOKING IN PUBLIC PLACES, PLACES OF EMPLOYMENT, AND CERTAIN OTHER AREAS

COMMENT: This section addresses the actual areas in which smoking is prohibited. Subsection A expands the

kinds of enclosed places that must be smoke-free beyond the state smoke-free workplace law (Labor Code 6404.5). Subsection B prohibits smoking in many outdoor areas. Subsection C prohibits littering in smoke-free areas.

(a) Enclosed Places. Smoking shall be prohibited in the following Enclosed places within the [City / County of _____] except in places listed in subsection (d) below, and except in such places in which smoking is already prohibited by state or federal law in which case the state or federal law applies:

COMMENT: The “except in such places as” language avoids potential preemption issues by making clear that the local ordinance is not duplicative of existing law, but rather “fills in” gaps in existing state or federal law.

- (1) Public Places;
- (2) Places of Employment;
- (3) Multi-Unit Residence Common Areas;

COMMENT: By including any place accessible to or used by the public in the definition of “public place,” this section requires all bars, including those that are owner-operated, to be smoke-free. The broader definition of “place of employment” also removes many exceptions to the state smoke-free workplace law. Note that the state exceptions are the source of almost all enforcement difficulties and confusion and that there is no legal reason a jurisdiction must include any exceptions at all. Finally, this section extends the protection that state law provides for the common areas of workplaces to the common areas in multi-unit residences that are not considered workplaces under the state law.

(4) Enclosed areas adjacent to an Enclosed area in which smoking is prohibited by any other [article / section] of this code, state law, or federal law and that have a common or shared air space such as, without limitation, openings, cracks, air ventilation systems, doorways, hallways, and stairways. Notwithstanding any other provision, the fact that smoke enters one Enclosed area from another Enclosed area is conclusive proof that the areas share a common or shared air space;

COMMENT: This provision ensures that enclosed areas adjacent to smoke-free enclosed places must be smoke-free in order to protect against smoke drifting into smoke-free areas. An enclosed area not adjacent to an enclosed area where smoking is prohibited under some other section of the local ordinance or state or federal law is not required to be smoke-free unless it shares a ventilation system with a smoke-free area, as described in the next provision.

- (5) Enclosed areas that have a common or shared ventilation, air conditioning or

heating system with an Enclosed area in which smoking is prohibited. Notwithstanding any other provision, the fact that smoke enters one Enclosed area from another Enclosed area is conclusive proof that the areas share a common or shared air space.

(b) Unenclosed Places. Smoking shall be prohibited in the following Unenclosed places within the [City / County of _____] except in such places in which smoking is already prohibited by state or federal law in which case the state or federal law applies:

COMMENT: The “except in such places as ...” language avoids potential preemption issues by making clear that the local ordinance is not duplicative of existing law, but rather “fills in” gaps in existing state or federal law.

(1) Places of Employment;

(2) Service Areas;

(3) Public Places including Dining Areas [except Unenclosed areas of a bar that does not serve food. If smoking is permitted in the Unenclosed area of a bar that does not serve food, the entire smoking section must be limited to one clearly designated area prominently marked with signs, and must be located at least five (5) feet from any doorway or opening into an Enclosed area. Smoking in an Unenclosed area of a bar is only permitted provided the smoke does not enter adjacent areas in which smoking is prohibited by any law or by the owner, lessee or licensee of the adjacent property.];

COMMENT: The optional exception compromises the scope of the ordinance by allowing smoking in outdoor patios of bars, provided that no smoke drifts into the enclosed bar or any other area where smoking is prohibited. Some communities find this type of exception necessary when balancing the need for smoke-free air with the demand for some area in which smoking is permitted. Make sure that “bar” is defined in the existing ordinance if this exception is to be used, or call TALC for assistance.

(4) Multi-Unit Residence Common Areas;

(5) Ticket, boarding, and waiting areas of transit depots; and

(6) The sites of public events including, for example, sports events, entertainment, speaking performances, ceremonies, pageants, and fairs.

COMMENT: Most of these outdoor prohibitions can be modified to allow a designated smoking area by inserting, after the place for which an exception is to be created, “provided however that this prohibition shall not prevent the establishment of a separate, designated smoking area set apart from the primary event area and no larger.”

(c) No person shall dispose of Smoking waste within the boundaries of an area in which

smoking is prohibited, including inside the perimeter of any Reasonable Distance required by this [article / chapter].

COMMENT: The following section (d) is not required. It is included as an option to aid those communities that are required to compromise the scope of secondhand smoke regulation.

[(d) Unless otherwise prohibited by law, smoking is permitted in the following Enclosed places:

(1) Significant tobacco retailers, if at all times minors are prohibited from entering the store;

COMMENT: This narrows the exemption in the state law that allows smoking in retail tobacco stores. Here, only businesses that derive three-fourths of their profits from the sale of tobacco products are exempted.

(2) By performers during theatrical productions, if smoking is an integral Part of the story in the theatrical production;

COMMENT: The ordinance could require the use of smoke-free devices in theatrical productions, rather than provide an exemption.

(3) Private residential units, except those used as a child care or health care facility subject to licensing requirements; and

(4) Up to [twenty-five percent (25%)] of hotel and motel guest rooms, if the hotel or motel permanently designates particular guest rooms as nonsmoking rooms such that [seventy-five (75%)] or more of its guest rooms are nonsmoking and ashtrays and matches are permanently removed from such nonsmoking rooms. Permanent “no smoking” signage shall be posted in nonsmoking rooms.]

COMMENT: These exceptions are designed to be very limited. Of course, broader exceptions are possible if needed to meet community needs. Note that unless exception (4) is included in the ordinance, all hotel and motel guest rooms must be smoke-free.

Sec. [____ (“3”)]. REASONABLE SMOKING DISTANCE REQUIRED — 20 FEET

(a) Smoking in Unenclosed areas shall be prohibited within a Reasonable Distance from any entrance, opening, crack, or vent into an Enclosed area in which smoking is prohibited, except while actively passing on the way to another destination and so long as smoke does not enter any Enclosed area in which smoking is prohibited.

COMMENT: This creates a buffer zone around enclosed smoke-free areas, allowing smoking only if passing

through the zone. Note that “Reasonable Distance” is defined in this ordinance as a minimum of twenty feet, although that definition can be altered.

(b) Smoking in Unenclosed areas shall be prohibited within a Reasonable Distance from any Unenclosed area in which smoking is prohibited under Section [____ (*2)] of this [article / chapter] except while actively passing on the way to another destination.

COMMENT: As written, this would prohibit smoking on private property and in private residences within twenty feet of an Unenclosed area in which smoking is already prohibited under the preceding section. If necessary to compromise on this point, private property can be exempted by inserting: “(c) The prohibitions in subdivisions (a) and (b) shall not apply to areas of private property that are not part of a Multi-Unit Residence Common Area, Place of Employment, Public Place, Playground, Recreational Area, or Service Area.”

Sec. [____ (*4)]. DUTY OF PERSON, EMPLOYER, BUSINESS, OR NONPROFIT ENTITY

(a) No person, Employer, Business, or Nonprofit Entity shall knowingly permit the Smoking of Tobacco Products in an area which is under the legal or de facto control of the person, Employer, Business, or Nonprofit Entity and in which smoking is prohibited by law and the person, Employer, Business or Nonprofit Entity is not otherwise compelled to act under state or federal law.

COMMENT: This section makes the business owner or employer responsible for any violation of existing laws prohibiting smoking. Thus, enforcement actions can be taken against the business rather than just the individual smoker.

(b) No person, Employer, Business, or Nonprofit Entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or ash cans, within an area which is under the legal or de facto control of the person, Employer, Business, or Nonprofit Entity and in which smoking is prohibited, including, without limitation, inside the perimeter of any Reasonable Distance required by this [article / chapter].

(c) Notwithstanding any other provision of this [article / chapter], any owner, landlord, Employer, Business, Nonprofit Entity, or other person who controls any property, establishment, or Place of Employment regulated by this chapter may declare any part of such area in which smoking would otherwise be permitted to be a nonsmoking area.

COMMENT: This would permit landlords to prohibit smoking in residential buildings. Note that a landlord wishing to designate residential units smoke-free should give adequate notice because such a designation could be a material change in the terms of the lease.

(d) “No Smoking” or “Smoke Free” signs, with letters of no less than one inch in height or the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently and conspicuously posted in every Enclosed and Unenclosed place in which Smoking is prohibited by this chapter, by the person, Employer, Business, or Nonprofit Entity that has legal or de facto control of such place. [At least one sign with the [City / County] phone number where complaints can be directed must be conspicuously posted in every place in which smoking is prohibited.] For purposes of this chapter, the City Manager or designee shall be responsible for the posting of signs in regulated facilities owned or leased in part by the [City / County]. Notwithstanding this provision, the presence or absence of signs shall not be a defense to the violation of any other provision of this [article / chapter].

COMMENT: Communities concerned about enforcement, and with the funds to print local signs, may wish to include the bracketed sentence, which requires signs to have the phone number for complaints. Note that this will be more expensive than using standard signs.

Sec. [____ (*5)]. PENALTIES AND ENFORCEMENT.

(a) Violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors.

COMMENT: Sometimes called a “wobbler,” this provision gives the prosecuting attorney discretion on whether to pursue a violation as an infraction or a misdemeanor. Alternatively, violations can be set as *either* an infraction or a misdemeanor in all circumstances. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

(b) Violations of this [article / chapter] are subject to a civil action brought by the [City Prosecutor / District Attorney] or the [City Attorney / County Counsel], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision provides civil fines for violating the ordinance. It requires that the city or county file a traditional civil suit. The fine amounts can be adjusted but cannot exceed \$1,000 per violation. Government Code section 36901.

(c) Any person who Smokes in an area where Smoking is prohibited is guilty of trespass and, if the area is accessible by the public or any Employee during the normal course of operations, such Smoking constitutes a public nuisance.

COMMENT: This provides additional remedies available to the City/County. For example, the City/County could seek a court-ordered injunction, preventing the violator from continuing the behavior that created the nuisance.

(d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance shall also constitute a violation.

COMMENT: This makes clear that the passive behavior of a business owner or employer still constitutes a violation of any of the ordinance's provisions.

(e) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedy available at law or in equity.

(f) Enforcement of this chapter shall be the responsibility of [____]. Any peace officer or code enforcement official also may enforce this chapter.

COMMENT: Identifying a specific enforcement agency, such as law enforcement and/or the Health Department, in the ordinance is a way of ensuring that enforcement actually occurs. However, it would be wise to discuss this in advance with the designated agency. If circumstances require that the duty of designating the enforcement agency be assigned to the City Manager or County Administrative Officer, the following may be substituted: "Enforcement of this chapter shall be implemented by the [City Manager / County Administrative Officer]." Permitting any peace officer or code enforcement official to enforce the law provides the maximum flexibility that is a key component to meaningful enforcement.

Sec. [____] (*6). PRIVATE ENFORCEMENT.

COMMENT: For further explication of the rationale behind and potential impact of this provision, please see TALC's memorandum entitled "The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances" available from TALC at (510) 444-8252 or by e-mail at talc@phi.org or from our website at <http://talc.phi.org>.

(a) Any person acting for the interests of itself, its members, or the general public (hereinafter "the Private Enforcer") may bring a civil action to enforce this chapter. Upon proof of a violation, a court shall award the following:

COMMENT: It is likely that "person" is defined in the Municipal Code or in the ordinance to which this is being appended. If not, the following definition could be added here: "'Person' means any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity."

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, \$[250] for each violation of this chapter (hereinafter “Statutory Damages”). Unless otherwise specified in this chapter, each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this chapter, no Private Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this chapter if a previous claim brought on behalf of the general public for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Private Enforcer was a party to that adjudication.

COMMENT: This provision allows for the collection of damages even if it is difficult or impossible to prove the actual amount of damages that resulted from the given violation. Statutory damages can add up to a substantial sum because each day of a continuing violation counts as a separate violation. However, if an action is brought in small claims court, the total amount of damages sought must fall below \$7,500. So, when considering the amount at which to set statutory damages in a given ordinance, it is worth considering whether a typical case brought under the ordinance will involve a claim for less than \$7,500. Note that this provision protects a retailer from being sued multiple times on behalf of the general public for the same violation.

(2) Restitution of the gains obtained in violation of this chapter.

COMMENT: This provision can prevent a person operating illegally from keeping the profits of the illegal acts. Restitution is a remedy that entails “making good,” in that it forces the defendant to give the plaintiff an equivalent value for any loss, damage, or injury. (See 1 Witkin, *Summary 9th Contracts* § 91 (1990).)

(3) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, or a conscious disregard for the public health.

COMMENT: Exemplary damages are also known as “punitive damages.” They are designed to punish and deter a defendant in a tort case who has acted in an outrageous manner.

(b) The Private Enforcer may also bring a civil action to enforce this chapter by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

COMMENT: In order to get an injunction, a plaintiff would have to sue in another division of superior court and not the small claims division. However, a plaintiff could seek a conditional judgment in small claims court. Note that the difference between an injunction and a conditional judgment is that with the latter, the defendant is not directly ordered to do something (or to refrain from doing something). Rather, the defendant is given a choice

between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See 1 Consumer Law Sourcebook for Small Claims *Court Judicial Officers* (California Department of Consumer Affairs 1996) §§ 12.32-12.34.) A conditional judgment could serve as an alternative to damages or restitution, or it could be in addition to damages or restitution. For example, a small claims court could order some monetary damages along with a conditional judgment giving the defendant a choice between ceasing the violations or paying even more money.

(c) Notwithstanding any legal or equitable bar against a Private Enforcer seeking relief on its own behalf, a Private Enforcer may bring an action to enforce this chapter solely on behalf of the general public. When a Private Enforcer brings an action solely on behalf of the general public, nothing about such an action shall act to preclude or bar the Private Enforcer from bringing a subsequent action based upon the same facts but seeking relief on its own behalf.

COMMENT: This is an important clause, so exercise care when considering whether to modify or eliminate it. This clause accomplishes two distinct goals:

First, the clause permits a Private Enforcer with a special relationship to a particular defendant to sue the defendant even though the Private Enforcer might otherwise be prohibited from doing so. Attorneys often refer to such prohibitions as “legal and equitable bars.” For example, an employee may be required to arbitrate—not litigate—any employment dispute, such as a dispute involving smoking in the workplace. Under this clause, such an employee may be required to arbitrate any personal claims (e.g., damages for personal injury from secondhand smoke) but can nevertheless sue the employer in court as a representative member of the general public. In such a circumstance, the Private Enforcer could only make the claims that every member of the general public could make (e.g., sue for Statutory Damages on behalf of the general public for the employer’s violation of a workplace smoking law).

Second, the clause permits a Private Enforcer who first sues solely on behalf of the general public to sue the same defendant later on any personal claims (although such personal claims might still be subject to legal or equitable bars as described above). Normally, repetitive suits based upon essentially the same facts and circumstances are prohibited. Attorneys often use the terms “res judicata,” “issue preclusion,” and “collateral estoppel” for such prohibitions. Under this clause, however, an employee subjected to smoking in the workplace can first sue her employer solely on behalf of the general public, receiving the Statutory Damages amount for each violation. If the employee is made ill by the secondhand smoke, she can sue the employer later for personal injury.

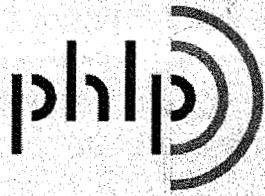
This clause is not intended to modify well established

legal rules concerning when a plaintiff may bring personal claims. Rather, it simply incorporates the logical line of reasoning that when a Private Enforcer brings a claim *solely* on behalf of the general public, the plaintiff is acting as a “private attorney general;” thus, the existence of personal claims is irrelevant and such claims are unaffected.

(d) Nothing in this chapter shall prohibit the Private Enforcer from bringing a civil action in small claims court to enforce this chapter, so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of small claims court as set forth in California Code of Civil Procedure section 116.220.

COMMENT: This clause is legally superfluous, but is serves to flag for plaintiffs and courts that small claims court would be an appropriate forum for resolving disputes under this provision.

SECTION 11L. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County of ____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof is declared invalid or unenforceable.



public health law & policy
technical assistance legal center

Smokefree Housing Ordinance

A Model California Ordinance Regulating Smoking in Multi-Unit Residences (with Annotations)

Revised December 2009
(Originally issued April 2005)

Developed by the Technical Assistance Legal Center (TALC),
a project of Public Health Law & Policy.

This material was made possible by funds received **from** the
California Department of Public Health, under contract #09-11182.

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www.phlpnet.org • talc@phlpnet.org • (510) 302-3380

Introduction

The Technical Assistance Legal Center (TALC) developed this Model Ordinance to help California cities and counties limit exposure to secondhand smoke in multi-unit residences such as apartment buildings, condominium complexes, senior housing, and single resident occupancy hotels. By creating nonsmoking living environments in multi-unit residences, communities can provide an opportunity for everyone to live smokefree – even people who can't afford to live in a single-family home.

The Ordinance's comprehensive design limits exposure to secondhand smoke by restricting smoking in common areas (indoors and outdoors), creating smokefree buffer zones, and prohibiting smoking in individual units. Communities may choose to include some or all of the options offered in the Model Ordinance, depending on the jurisdictions' policy objectives. TALC can help adapt this Model Ordinance to meet an individual community's needs.

To assist cities and counties in creating smokefree multi-unit housing, this Model Ordinance includes:

- Extensive findings based on the latest scientific information documenting the health risks associated with tobacco use and exposure to secondhand smoke;
- Restrictions on smoking in the indoor and outdoor common areas of all types of multi-unit residences, with the option to create designated outdoor smoking areas that meet specific criteria;
- Smokefree buffer zones that can expand to include neighboring property and/or balconies and patios of adjacent units to limit drifting secondhand smoke from entering nonsmoking areas;
- Prohibitions on smoking inside the units of multi-unit residences, including apartments and condominiums;
- Recommended procedures for designating nonsmoking units by landlords and homeowners' associations; and
- Robust enforcement mechanisms including no-smoking lease terms and options for private individuals and organizations to enforce the smokefree housing provisions.

This Model Ordinance is very broad and can be used to limit smoking in *all* types of multi-unit dwelling places – from hotels to long-term health care facilities – as well as apartments and condominiums. Some of the comments in the Model Ordinance describe how to narrow the scope of the smoking restrictions, should that be necessary.

In addition, this Model Ordinance provides a step-by-step approach to designating nonsmoking units, including a recommended implementation process that allows tenants and landlords to become familiar with the new smoking restrictions over a 12-month period. Implementing a smokefree housing law by using a reasonable phase-in period followed by a certain date on which everyone is required to abide by the law is generally perceived to be the most fair and effective approach – balancing public health needs against the potential inconvenience the ordinance puts on tenants who smoke and landlords who must implement the new policy.

Please note: while this Ordinance is not written specifically for communities with rent control laws, there are no legal restrictions that would prevent those cities from adopting a smokefree housing law. However, it is highly recommended that in such jurisdictions the city attorney and rent control board be included in selecting and adopting the specific provisions for a smokefree housing law.

This Model Ordinance offers a variety of options. In some instances, blanks (e.g., [_____]) prompt you to customize the language to fit your community's needs. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure that the ordinance is consistent with a community's existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

TALC has also developed other ordinances to create smokefree outdoor areas, such as parks, beaches, dining patios, and public events. If you would like to adopt a comprehensive or more customized approach, some aspects of other TALC ordinances can be combined with this ordinance. If you have questions about how to adapt this or other TALC ordinances for your community, please contact TALC for assistance at (510) 302-3380 or submit your question via our website at www.phlpnet.org/tobaccoquestions.

**AN ORDINANCE OF THE [CITY / COUNTY OF ____] PROHIBITING SMOKING IN
AND AROUND MULTI-UNIT RESIDENCES AND AMENDING THE [____]
MUNICIPAL CODE**

The [City Council / County Board of Supervisors] of the [City / County of ____] does ordain as follows:

SECTION I. FINDINGS.

The [City Council / County Board of Supervisors] of [____] hereby finds and declares as follows:

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health threat, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States,¹ accounting for about 443,000 deaths each year;² and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;³ and
- Some of the most common types of cancers, including stomach, liver, uterine cervix, and kidney cancers, are related to tobacco use;⁴ and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke;⁵ and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;⁶ and

¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

² US Department of Health and Human Services, Centers for Disease Control and Prevention. "Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses – United States, 2000-2004." *Morbidity and Mortality Weekly Report*, **57(45)**: 1226-1228, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

⁴ Leistikow B, Zubair K, et al. "Male Tobacco Smoke Load and Non-Lung Cancer Mortality Associations in Massachusetts." *BMC Cancer*, **8**:341, 2008. Available at: www.biomedcentral.com/1471-2407/8/341.

⁵ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2007. Report highlights available at: www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html.

⁶ Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf; See California Environmental Protection Agency, Air Resources Board. *News Release, California Identifies Secondhand*

- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm;⁷ and

WHEREAS, exposure to secondhand smoke causes death and disease, as evidenced by the following:

- Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States;⁸ and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;⁹ and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year;¹⁰ and exacerbates childhood asthma;¹¹ and

WHEREAS, the U.S. Food and Drug Administration conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which users and bystanders could potentially be exposed;¹² and

WHEREAS, tobacco use and exposure to secondhand smoke impose great economic costs, as evidenced by the following:

- The total annual economic burden of smoking in the United States is \$193 billion;¹³ and
- From 2001-2004, the average annual health care expenditures attributable to smoking were approximately \$96 billion;¹⁴ and
- The medical and other costs to nonsmokers due to exposure to secondhand smoke were estimated at over \$10 billion per year in the United States in 2005;¹⁵ and

Smoke as a "Toxic Air Contaminant." Jan. 26, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

⁷ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. 2006, p. 8 & 17. Available at: www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf.

⁸ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

⁹ Barnoya, J and Glantz, S. "Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking." *Circulation*, 111: 2684-2698, 2005. Available at: www.circ.ahajournals.org/cgi/content/full/111/20/2684.

¹⁰ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

¹² US Food and Drug Administration. *News Release, FDA and Public Health Experts Warn About Electronic Cigarettes*. 2009. Available at: www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm.

¹³ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹⁴ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹⁵ Behan DF, Eriksen MP and Lin, Y. *Economic Effects of Environmental Tobacco Smoke*. Schaumburg, IL: Society of

- The total annual cost of smoking in California was estimated at \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;¹⁶ and
- California's Tobacco Control Program saved the state and its residents \$86 billion in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly;¹⁷ and

WHEREAS, smoking is the primary cause of fire-related injuries and deaths in the home, as evidenced by the following:

- Cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States," causing an estimated 142,900 smoking-related fires, 780 deaths, 1,600 injuries, and \$606 million in direct property damage in 2006;¹⁹ and
- One in four fatalities from home fires caused by smoking is NOT the smoker whose cigarette started the fire, and 25% of those deaths were of neighbors or friends of the smoker;²⁰ and
- Smoking in a residence where long-term oxygen therapy takes place is very dangerous as oxygen is a fire accelerant, and 27% of fatalities due to smoking during long-term oxygen therapy occurred in multifamily dwellings;²¹ and
- The United States Fire Administration recommends that people smoke outdoors;²² and

WHEREAS, nonsmokers who live in multi-unit dwellings can be exposed to neighbors' secondhand smoke, as evidenced by the following:

- Secondhand smoke can seep under doorways and through wall cracks;²³ and

Actuaries, 2005, p. 2. Available at: [www.soa.org/files/pdf/ETSReportFinalDraft\(Final%203\).pdf](http://www.soa.org/files/pdf/ETSReportFinalDraft(Final%203).pdf).

¹⁶ Max W, Rice DP, Zhang X, et al. *The Cost of Smoking in California, 1999*. Sacramento, CA: Tobacco Control Section, California Department of Health Services, 2002, p. 74. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=26&context=ctcre>.

¹⁷ Lightwood JM, Dinno A and Glantz SA. "Effect of the California Tobacco Control Program on Personal Health Care Expenditures." *PLoS Med*, 5(8): e178, 2008. Available at: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050178.

¹⁸ Leistikow B, Martin DC and Milano CE. "Fire Injuries, Disasters, and Costs from Cigarettes and Cigarette Lights: A Global Overview." *Preventive Medicine*. 31: 91-99, 2000. Available at: <http://leistikow.ucdavis.edu/SmokingFires.pdf>.

¹⁹ Hall JR. *U.S. Smoking-Material Fire Problem*. Quincy, MA: National Fire Protection Association, 2008, p. vii. Available at: www.nfpa.org/assets/files//PDF/OS.Smoking.pdf. (Factsheet available at: www.nfpa.org/assets/files//PDF/smokingfactsheet.pdf.)

²⁰ Hall JR, Ahrens M, Rohr K, et al. *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis*. US Department of Homeland Security, 2006, p. 17. Available at: www.usfa.dhs.gov/downloads/pdf/publications/fa-302-508.pdf.

²¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. "Fatal Fires Associated with Smoking During Long-Term Oxygen Therapy – Maine, Massachusetts, New Hampshire, and Oklahoma, 2000 – 2007." *Morbidity and Mortality Weekly Report*, 57(31): 852-854, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5731a3.htm?s_cid=mm5731a3_e.

²² Hall JR, Ahrens M, Rohr K, et al. *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis*. US Department of Homeland Security, 2006, p. 19. Available at: www.usfa.dhs.gov/downloads/pdf/publications/fa-302-508.pdf.

²³ Wagner J, Sullivan DP, Faulkner D, et al. "Environmental Tobacco Smoke Leakage from Smoking Rooms." *Journal of*

- Persons living in apartments near smokers can be exposed to elevated pollution levels for 24 hours a day, and at times, the particulate matter exposure can exceed the U.S. Environmental Protection Agency's 24-Hour Health Based Standard;²⁴ and
- The Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure and that separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely prevent secondhand smoke exposure;²⁵ and

WHEREAS, most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences, as evidenced by the following:

- Nearly 87% of Californians and 91% of California women are nonsmokers;²⁶ and
- 74% of Californians surveyed approve of apartment complexes requiring at least half of rental units be nonsmoking;²⁷ and
- 69% of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings and 78% support laws that create nonsmoking units;²⁸ and
- 62% of California renters feel that there is a need for laws to limit smoking in apartments;²⁹ and

WHEREAS, a local ordinance that authorizes residential rental agreements to include a prohibition on smoking of tobacco products within rental units is not prohibited by California law;³⁰ and

WHEREAS, there is no Constitutional right to smoke;³¹ and

Occupational and Environmental Hygiene, I: 1 10-1 18, 2004. Available at: <http://eetd.Ibl.gov/IEP/pdf/LBNL-5 1010.pdf>.

²⁴ Klepeis N. *Measuring the Seepage of Tobacco Smoke Particles Between Apartment Units*. California's Clean Air Project, 2008. Available at: http://ccap.etr.org/base/documents/Measuring_the-Seepage.pdf.

²⁵ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2006, p. 11. Available at: www.cdc.gov/tobacco/data_statistics/sgr/sgr_2006/index.htm#full.

²⁶ California Department of Health Services. *News Release, New Data Show 91 Percent of California Women Don't Smoke*. 2007. Available at: www.applications.dhs.ca.gov/pressreleases/store/PressReleases/07-37%20dhs%20smoking%20rates-with%20charts.html.

²⁷ Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure*. 2008. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf (Statewide poll of 600 California voters, conducted November 2008).

²⁸ Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure*. 2008. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf (Statewide poll of 600 California voters, conducted November 2008).

²⁹ American Lung Association of California, Center for Tobacco Policy and Organizing. *Statewide Apartment Renter Study*. 2004. Available at: www.center4tobaccopolicy.org/_files/_files/5242_Center%20Renter%20Survey%20Results%20May%202004.pdf (A survey of apartment residents throughout California).

³⁰ Cal. Legislative Counsel Op., 21547, *Secondhand Smoke in Multi-Unit Housing (Apartments & Condos) Smoking Bans: Residential Rental Property*, (September 23, 1999). Highlights available at: www.respect-ala.org/drift_samsmokingbans.htm.

³¹ Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke*. 2005. Available at: www.phlpnet.org/tobacco-control.

WHEREAS, California law prohibits smoking in virtually all indoor places of employment reflecting the state policy to protect against the dangers of exposure to secondhand smoke;³² and

WHEREAS, California law declares that anything which is injurious to health or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance;³³ and

WHEREAS, local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance;³⁴ and

NOW THEREFORE, it is the intent of the [City Council / County Board of Supervisors] in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking around non-tobacco users; by protecting children from exposure to smoking where they live and play; and by protecting the public from nonconsensual exposure to secondhand smoke in and around their homes.

SECTION II. [Article / Section] of the [City / County of _____] Municipal Code is hereby amended to read as follows:

Sec. [_____ (*1)]. DEFINITIONS. For the purposes of this [article / chapter] the following definitions shall govern unless the context clearly requires otherwise:

(a) “Adjacent Property” means any Unenclosed Area of property, publicly or privately owned, that abuts a Multi-Unit Residence [, but does not include property containing detached single-family homes / , but does not include property containing:only residential structures].

COMMENT: This definition is used to describe the reach of nonsmoking “buffer zones” around Multi-Unit Residences. It defines where Smoking is prohibited when buffer zones reach beyond the property lines of the Multi-Unit Residence and extend onto neighboring property (see Section *3 “Nonsmoking Buffer Zones”).

Four options are available, listed below from the strongest to the weakest protections.

Option one—include Everything: Include all adjoining property, public and private, by omitting all bracketed language. With this option, a smokefree buffer zone might encompass a portion of the backyard of a single-family residence.

Option two—include Everything but Single-Family Homes: Include all adjoining property, public and private, except single-family residences by including only the single-underlined language.

³² Cal. Lab. Code § 6404.5 (West 2009).

³³ Cal. Civil Code § 3479 (West 2009).

³⁴ *In Re Jones*, 56 Cal.App.2d 658,663 (1943); *See also* Cal. Const., art. XI, § 7 and Cal. Gov. Code § 38771 (West 2009).

Option three—*Include Everything but Residential Property*: Include all adjoining property, public and private, except residential property (e.g., single-family residences or Multi-Unit Residences) by including only the double-underlined language. This option still includes, for example, outdoor areas of businesses, parking lots, and some places not open to the general public such as members-only clubs

Option four—*Exclude Everything*: **Do** not include any adjoining property in the buffer zones, in which case the entire definition should be deleted.

(b) “Common Area” means every Enclosed Area or Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit of that Multi-Unit Residence are entitled to enter or use, including, for example, halls and paths, lobbies and courtyards, elevators and stairs, community rooms and playgrounds, gym facilities and swimming pools, parking garages and parking lots, shared restrooms, shared laundry rooms, shared cooking areas, and shared eating areas.

COMMENT: Note that California Labor Code section 6404.5 (the state smokefree workplace law) may already prohibit Smoking in indoor Common Areas if the Multi-Unit Residence has employees, such as maintenance workers, property managers, or others who work on-site.

The definition of Common Areas does not include balconies, patios, or decks associated with individual Units because these are not shared areas. Balconies, patios, and decks are included in the definition of Unit.

(c) “Common Interest Complex” means a Multi-Unit Residence that is a condominium project, [a community apartment project,] [a stock cooperative,] [or a planned development] as defined by California Civil Code section 1351.

COMMENT: This definition is used to distinguish owned multi-unit housing (e.g., condominiums and townhomes) from other types of Multi-Unit Residences, such as apartments that are leased, which are defined in the term “Rental Complex” (see below). The distinction between all types of Multi-Unit Residences and those that are owned is necessary if a community decides to regulate smoking in less than 100% of existing Units in Multi-Unit Residences (see Sections *5 and *6). This distinction is necessary because of the logistical difficulty in determining which owner-occupied Units should be nonsmoking and which should allow Smoking.

The list of optional Common Interest Complexes includes other types of housing that, like condominiums, have covenants, conditions, and restrictions (CC&Rs) and are managed by a homeowners’ association.

(d) “Enclosed Area” means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has:

(1) any type of overhead cover whether or not that cover includes vents or other openings and at least [three (3)] walls or other vertical boundaries of any height whether or not those

boundaries include vents or other openings; or

(2) [four (4)] walls or other vertical boundaries that exceed [six (6)] feet in height whether or not those boundaries include vents or other openings.

COMMENT: The number of walls and the height threshold can be customized to meet the needs of your community, and changing these numbers will affect the scope of the ordinance. Reducing the number of walls in this definition would broaden the definition of Enclosed Area, which would result in narrowing the definition of Unenclosed Area. For the purposes of this ordinance, the distinction between “enclosed” and “unenclosed” is primarily relevant to establishing designated Smoking areas (see Section *2) and nonsmoking buffer zones (see Section *3).

An area that is partially covered by anything would be analyzed under subparagraph (1), whereas only areas that are totally uncovered would be analyzed under subparagraph (2). It can be difficult to apply Labor Code section 6404.5 to areas that are surrounded by lattice, hedges, and other nonsolid structures. For purposes of this ordinance any vertical boundary, regardless of composition, constitutes an “other vertical boundary” for application of this definition.

NOTE: If the Municipal Code already has Smoking restrictions, it may contain a definition of “enclosed.” Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with the new definition.

(e) “Landlord” means any Person who owns property let for residential use, any Person who lets residential property, and any Person who manages such property, except that “Landlord” does not include a master tenant who sublets a Unit as long as the master tenant sublets only a single Unit of a Multi-Unit Residence.

COMMENT: The Municipal Code may already contain a definition of “Landlord.” If so, the definition provided here can be omitted, although sublessors should specifically be excluded.

(f) “Multi-Unit Residence” means property containing two (2) or more Units [, except the following specifically excluded types of housing:

(1) a hotel or motel that meets the requirements set forth in California Civil Code section 1940(b)(2);

(2) a mobile home park;

(3) a campground;

(4) a marina or port;

(5) a single-family home;

(6) a single-family home with a detached or attached in-law or second unit when permitted pursuant to California Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the [City / County] adopted pursuant to those sections; and

(7) _____].

COMMENT: Because the definition of Unit in this ordinance is so broad and includes all types of dwelling places—from rooms in a

hotel to tents at a campground—a community may want to limit the types of dwelling places covered by the smokefree housing ordinance. The optional language provides examples of the types of exceptions that communities are likely to consider.

Note that the definition of Multi-Unit Residence without any exemptions would include the following types of dwelling places: apartments, condominium projects, townhomes, stock cooperatives, and co-housing; affordable housing (for seniors, for disabled tenants, for Section 8, etc.); long-term health care facilities, assisted living facilities, hospitals, and family support facilities; hotels, motels, single room occupancy (“SRO”) facilities, dormitories, and homeless shelters; mobile home parks, campgrounds, marinas, and ports; single-family homes and single-family homes with an in-law unit.

(g) “New Unit” means a Unit that is issued a [certificate of occupancy / final inspection] more than 180 days after [insert effective date of ordinance] [and also means a Unit that is let for residential use for the first time more than 180 days after [insert effective date of ordinance]].

COMMENT: This definition is used to differentiate between Units that are already built when the ordinance is adopted and Units constructed afterward. The distinction is important because, under this ordinance, all Units built after the ordinance is adopted are required to be nonsmoking, whereas Smoking could be allowed in some Units of existing multi-unit housing.

The definition incorporates a trigger date of 180 days after the ordinance takes effect so as to “grandfather” buildings already under construction.

The *certificate of occupancy* or *final inspection* is probably the most administrable way to distinguish between existing and New Units. However, a community could distinguish between Units for which land use entitlements have or have not issued or Units which have or have not been occupied by a tenant for the first time.

To include existing housing that may become available to the rental market after the ordinance is adopted, such as an in-law cottage that had previously never been rented, add the optional clause at the end of the definition.

Note that the term “New Unit” is a subset of “Unit,” so whenever the term Unit is used in the ordinance, it includes all New Units.

(h) “Nonsmoking Area” means any Enclosed Area or Unenclosed Area of a Multi-Unit Residence in which Smoking is prohibited by: (1) this [chapter / article] or other law; (2) by binding agreement relating to the ownership, occupancy, or use of real property; or (3) by designation of a Person with legal control over the area. In the case of a Smoking prohibition established only by private agreement or designation and not by this [chapter / article] or other law, it shall not be a violation of this [chapter / article] for a Person to engage in Smoking or to allow Smoking in that area unless: (1) the Person knows that Smoking is not permitted; or (2) a reasonable Person would know that Smoking is not permitted.

(i) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity including government agencies.

COMMENT: The Municipal Code may contain a definition of “person”; review any existing definition of “person” in the Municipal Code to determine whether to include this definition in your ordinance.

This definition includes most businesses. In addition, it includes the City and County.

(j) “Rental Complex” means a Multi-Unit Residence for which *fifty*percent (50%) or more of Units are let by or on behalf of the same Landlord.

COMMENT: This definition is used to distinguish traditional rental housing (e.g., apartments, SROs) from other types of Multi-Unit Residences, such as condominiums that are owner-occupied. The distinction between all types of Multi-Unit Residences and those that are leased is necessary if a community decides to regulate smoking in less than 100% of *existing* Units in Multi-Unit Residences (see Section *6). This distinction is necessary because of the logistical difficulty in determining which owner-occupied Units should be nonsmoking and which should allow Smoking.

(k) “Smoke” means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “Smoke” includes, but is not limited to, tobacco smoke, electronic cigarette vapors, marijuana smoke, and crack cocaine smoke.

COMMENT: This is a special definition that is more limited than the common understanding of what “smoke” is. For example, smoke from a fireplace or a barbecue grill is not “Smoke” for the purposes of this ordinance because the smoke generated by those activities is not produced for the purpose of inhaling it. The limitation placed on “Smoke” by this definition is important to avoid unintended consequences, such as inadvertently prohibiting the burning of incense or use of barbecue grills.

This definition includes e-cigarettes. It also marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to include Section *11(b).

(l) “Smoking” means engaging in an act that generates Smoke, such as, for example: possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, an operating electronic cigarette or a lighted cigarette of any kind; or lighting or igniting a pipe, a hookah pipe, a cigar, or a cigarette of any kind.

COMMENT: This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to include Section *11(b).

(m) “Unenclosed Area” means any area that is not an Enclosed Area.

(n) “Unit” means a personal dwelling space, even where lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio. “Unit” includes without limitation: an apartment; a condominium; a townhouse; a room in a long-term health care facility, assisted living facility, or hospital; a hotel or motel room; a room in a single room occupancy (“SRO”) facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit. Unit includes a New Unit.

COMMENT: This definition is intentionally extremely broad. It is designed to capture all conceivable “dwelling spaces” as the examples illustrate. However, because of the way that this model ordinance is designed, any limitations on the types of housing covered by the ordinance should be added to the defined term “Multi-Unit Residence” and *not* here. For example, some “mobile homes” in mobile home parks may be included in this definition and even cited in the examples but, nevertheless, “mobile homes” can be specifically excluded from the ordinance under the definition of “Multi-Unit Residence.”

Sec. [____ (*2)]. NO SMOKING PERMITTED IN COMMON AREAS EXCEPT IN DESIGNATED SMOKING AREAS.

COMMENT: If your Municipal Code already has Smoking restrictions, it may contain a provision for smokefree Common Areas of multi-unit housing. Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with new ordinance language.

(a) Smoking is prohibited in all Common Areas pursuant to Section [____ (*9)] except that a Person with legal control over a Common Area, such as, for example, a Landlord or homeowners’ association, may designate a portion of the Common Area as a designated Smoking area provided that at all times the designated Smoking area complies with paragraph (b) below.

(b) A designated Smoking area:

(1) Must be an Unenclosed Area.

(2) Must be located at least twenty-five (25) feet from any Enclosed Area that is a Nonsmoking Area. A Person with legal control over a Common Area in which a designated Smoking area has been designated shall modify, relocate or eliminate that designated Smoking area so as to maintain compliance with the requirements of this subsection (b) as laws change, as binding agreements are created, and as Nonsmoking Areas on neighboring property are established.

COMMENT: This clause limits where a designated Smoking area can be located in order to prevent drifting Smoke from entering smokefree areas. As written, it includes areas on neighboring property that are designated as nonsmoking by contract (e.g., a smokefree lease term for a rental unit next to, but not part of, the Multi-Unit Residence) and areas on neighboring property

designated by a property owner or lessee as nonsmoking (e.g., a neighboring business or homeowner).

(3) Must be at least twenty-five (25) feet from Unenclosed Areas primarily used by children and Unenclosed Areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, and school campuses.

(4) Must be no more than [ten percent (10%)] of the total Unenclosed Area of the Multi-Unit Residence for which it is designated.

(5) Must have a clearly marked perimeter.

(6) Must be identified by conspicuous signs.

(c) No Person with legal control over a Common Area in which Smoking is prohibited by this [chapter / article] or other law shall knowingly permit the presence of ash trays, ash cans, or other receptacles designed for or primarily used for disposal of Smoking waste within the area.

(d) Clear and unambiguous “No Smoking” signs shall be posted in sufficient numbers and locations to make Common Areas where Smoking is prohibited by this [article / chapter] or other law obvious to a reasonable person. The signs shall have letters of no less than one inch in height or contain the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle crossed by a red bar). Such signs shall be maintained by the Person or Persons with legal control over the Common Areas. The absence of signs shall not be a defense to a violation of any provision of this [article / chapter].

Sec. [_____] (*3). NONSMOKING BUFFER ZONES.

(a) Smoking is prohibited in Unenclosed Areas of Multi-Unit Residence, including balconies, porches, decks, and patios, within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area that is a Nonsmoking Area.

COMMENT: This section addresses the problem of Smoking so close to a “nonsmoking” area that Smoke easily drifts into it. This restriction even applies to Smoking on exclusive-use balconies, porches, decks, and patios of Units where Smoking would otherwise be allowed, *if* these areas are within 25 feet of a nonsmoking Unit. A community can make *all* exclusive-use outdoor areas nonsmoking. To do so, include the optional subsection (d) below.

[(b) Smoking is prohibited in Unenclosed Areas of Adjacent Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area that is a Nonsmoking Area.]

COMMENT: To create the most comprehensive smokefree buffer zone, include this option. This subsection creates a smokefree buffer zone that extends to Unenclosed Areas on *neighboring* property that is within 25 feet of any doorway, window, etc., of the Multi-Unit Residence. This comprehensive provision can be fine-tuned by selecting a version of the “Adjacent Property” definition

to exempt certain types of neighboring property, such as property containing detached single-family homes, while still prohibiting Smoking on other private property, such as bar patios and loading docks. If this option is not included in your community's ordinance, the defined term "Adjacent Property" in Section *1 should be deleted.

[(c) Subsections (a) and (b) above do not apply to a Person who is Smoking in the restricted buffer zone area for less than a minute while actively passing on the way to another destination, and who does not enter the buffer zone area while Smoking more than twice per day.]

COMMENT: This optional exemption for a passerby who is Smoking (e.g., Smoking while walking or driving by) is a common component of entryway Smoking bans. However, such an exemption could prove problematic in the multi-unit housing context because a Person who is Smoking could claim to be just passing through but in fact be intentionally violating the ordinance. The timing restriction is an attempt to limit this problem but does not eliminate it completely. Without this exemption, a Person who is Smoking in a buffer zone while passing through it will be in violation of the law.

[(d) Notwithstanding any other provision of this [article / chapter], Smoking is prohibited in all exclusive-use Unenclosed Areas associated with a Unit, such as, for example, a private balcony, porch, deck, or patio.]

COMMENT: This optional subsection prohibits Smoking in *all* exclusive-use outdoor areas that are associated with a Unit even if Smoking is permitted within the Unit (i.e., it is not a designated nonsmoking Unit). By doing so, this subsection unambiguously addresses the problem of Smoke drifting from the balcony or patio of one Unit into a neighboring Unit, a top complaint from residents living in multi-family housing. On the other hand, it might have the effect of leading people to increase their Smoking in the Unit, despite public health and fire safety advice to only engage in Smoking outside.

Sec. [____ ("4)]. SMOKING RESTRICTIONS IN NEW UNITS OF MULTI-UNIT RESIDENCES.

(a) All New Units of a Multi-Unit Residence are hereby designated nonsmoking Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio; and including without limitation New Units in a Rental Complex and New Units in a Common Interest Complex.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [____ (*9)].

COMMENT: As written, this section applies to *a//* New Units of a Multi-Unit Residence. While the percentage of nonsmoking New Units required is a policy choice and may be modified, 100% nonsmoking Units is recommended. If your community chooses to require a lesser percentage, substitute the following provision:

(a) Up to one hundred percent (100%), but no less than ~~[ninety percent (90%)]~~, of New Units of a Multi-Unit Residence, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as a private balcony, porch, deck, or patio, shall be permanently designated as nonsmoking Units by the Person or Persons causing the construction of the New Units.

(b) Smoking in a designated nonsmoking Unit shall be a violation of this [article/ chapter] as provided in Section [____ (“9”).

(c) Designated nonsmoking Units shall not share a ventilation system with a Unit in which Smoking may be allowed. To the maximum extent practicable, nonsmoking Units shall be grouped together vertically and horizontally and physically separated from Units where Smoking may be allowed. Where possible, all units where Smoking may be allowed shall be in a single building of a multi-building Multi-Unit Residence.

(d) The designations required by subsection (a) above shall be permanent; shall be submitted in accordance with Section [____ (“10”); and shall be submitted by the Person who controls the Multi-Unit Residence in which the New Unit is located prior to any sale or lease of a New Unit and before a New Unit is occupied. The submitted designations must contain a description of each designated nonsmoking Unit sufficient to identify the Unit and must be accompanied by a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

Sec. [____ (*5)]. NONSMOKING DESIGNATIONS FOR EXISTING UNITS OF A COMMON INTEREST COMPLEX.

COMMENT: This subsection prohibits Smoking inside *all* existing Units in a Common Interest Complex, such as condominiums, but provides an opportunity for the homeowners’ association to hold an election to allow Smoking in some of the existing Units. A potential incentive for a Common Interest Complex to establish 100% nonsmoking Units is that *no action* is required to set this standard. Action is only required if the Common Interest Complex wishes to “opt out” of the 100% default established in subsection (a).

If your community wants to prohibit Smoking in *all* existing Units of Common Interest Complexes regardless of owner preferences, omit subsection (c) and the reference to it in subsection (a) (“*provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Common Interest Complex fully complies with subsection (c) below.*”?). On the other hand, if your community wants to regulate *only* Rental Complexes and not Common Interest Complexes, delete this entire Section (*5).

(a) All Units of a Common Interest Complex that are not New Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, are hereby designated nonsmoking Units as of *[insert effective date of*

ordinance + 1 year]; provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Common Interest Complex fully complies with subsection (c) below.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter 3] as provided in Section [____ (*9)].

(c) By a vote of the membership as provided in subsection (1) below, a Common Interest Complex may choose to designate fewer than one-hundred percent (100%) of existing Units as nonsmoking Units by fully complying with the requirements stated in subsections (1) - (4) below. Otherwise subsection (a) above shall apply.

(1) A vote by the membership on the threshold question of allowing less than one hundred percent (100%) of Units to be designated nonsmoking Units must take place before [*insert effective date of ordinance + 270 days*].

COMMENT: The recommended timeframe of 270 days (or nine months) is suggested as a reasonable amount of time to organize and hold the homeowners' association election while adhering to the legally required guidelines.

(2) Up to one hundred percent (100%), but no less than [eighty percent (80%)], of Units that are not New Units, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, shall be permanently designated as nonsmoking Units.

(3) Where possible, best efforts shall be made to group nonsmoking Units together, both horizontally and vertically, and physically separate them from Units where Smoking may be allowed.

(4) No later than [*insert effective date of ordinance + 1 year*] the final designations must be made and the following must be submitted in accordance with Section [____ (*10)]:

(i) a description of each designated nonsmoking Unit sufficient to readily identify the Unit; and

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

Sec. [____ (*6)]. NONSMOKING DESIGNATIONS FOR EXISTING UNITS OF A RENTAL COMPLEX.

COMMENT: This subsection prohibits Smoking inside *all* existing Units in a Rental Complex, but provides an opportunity for a Landlord to allow Smoking in some of the existing Units. A potential incentive for a Landlord to establish 100% nonsmoking Units is that only *limited action* is required by a Landlord to set this standard. Substantial action is required if the Landlord wishes to "opt out" of the 100% default established in subsection (a).

If your community wants to prohibit Smoking in *a//*existing Units

of Multi-Unit Residences regardless of Landlord preference, omit subsection (d) entirely and all references to subsection (d) in subsections (a)–(c).

(a) All Units of a Rental Complex that are not New Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, are hereby designated nonsmoking Units as of *[insert effective date of ordinance + 120 days]*; provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Landlord fully complies with subsection (d) below.

(b) Smoking in a designated nonsmoking Unit is a violation of this *[article / chapter]* as provided in Section *[____ (*9)]*.

(c) Except if a Landlord fully complies with subsection (d) below, at least sixty (60) days before *[insert effective date of ordinance + 120 days]*, the Landlord shall provide each tenant with:

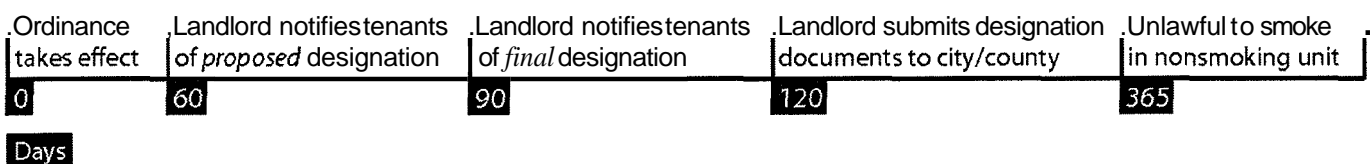
(1) a written notice clearly stating that all Units, including the tenant’s Unit, are designated nonsmoking Units and that Smoking in a Unit will be illegal as of *[insert date specified in Sec. *9(c)]*; and

(2) a copy of this *[article / chapter]*.

(d) A Landlord may choose to designate fewer than one-hundred percent (100%) of existing Units that are not New Units of a Rental Complex as nonsmoking Units by fully complying with the requirements stated in subsections (1) - (7) below. However, subsection (a) above shall apply whenever a Landlord takes no action or only partially complies with the requirements of this subsection.

COMMENT: This subsection provides a step-by-step approach to designating nonsmoking and Smoking-allowed Units in Rental Complexes. This ordinance contains a recommended implementation process that allows tenants and Landlords to become familiar with the new Smoking restrictions over a 12-month period. Here is a timeline illustrating the implementation schedule:

Timeline to Designate Nonsmoking Units



Implementing a smokefree housing law by using a reasonable phase-in period followed by a certain date on which everyone is required to abide by the law is generally perceived to be the most fair approach—balancing public health needs against the potential inconvenience the ordinance puts on Smoking tenants and Landlords who must implement the new policy. For legal

reasons, a *12-month* phase-in period strikes a good balance between the potential legal rights of tenants under existing agreements and the legal authority of Landlords to modify those agreements as this ordinance requires.

(1) The Landlord shall permanently designate up to one hundred percent (100%) of Units, but no less than [eighty percent (80%)] of Units, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, as nonsmoking Units by the Landlord.

(2) To the maximum extent practicable, nonsmoking Units must be grouped together both horizontally and vertically and physically separated from Units where Smoking may be allowed. Where possible all Units where Smoking may be allowed shall be in a single building of a multi-building Multi-Unit Residence.

(3) No later than [*insert effective date of ordinance + 220 days*] a Landlord who chooses to designate fewer than 100% of the Units of a Multi-Unit Residences as nonsmoking shall submit the following in accordance with Section [____ (* 10)]:

(i) a description of each designated nonsmoking Unit sufficient to identify the Unit; and

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

(4) At least sixty (60) days before submitting the nonsmoking Unit designations required by subsection (3) above, the Landlord shall provide each tenant with:

(i) a written notice of the proposed designations, clearly stating that Smoking in a Unit which is designated as a nonsmoking Unit will be illegal as of [*insert date specified in Section *9(c)*], and inviting comments on the proposed designations of nonsmoking Units within the requisite timeline;

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units; and

(iii) a copy of this [article / chapter].

COMMENT: This subsection requires Landlords to provide tenants notice of proposed nonsmoking designations before the designations are final. The intent is to allow tenants to provide comments to the Landlord so that the Landlord can accommodate tenant wishes, if possible. Note, however, that the Landlord is not obligated to make changes based on tenants' comments. Existing law prohibits a Landlord from making designations adverse to a tenant's interests for a discriminatory or other illegal purpose.

A copy of this ordinance is required to accompany the notice of a nonsmoking Unit designation so that tenants may assess for themselves their full rights and obligations. Alternatively, the ordinance can be reworded so that a summary of tenants' rights and obligations is required instead of (or in addition to) a copy of the ordinance itself. If this approach is adopted, steps should be taken to ensure the accuracy and appropriateness of any summary, as summaries are inherently incomplete.

(5) A Landlord may modify the proposed designations based upon comments received from tenants.

(6) At least thirty (30) days before submitting the final designations of nonsmoking Units required by subsection (3) above, the Landlord shall provide all tenants written notice of the final designations clearly stating that Smoking in a designated nonsmoking Unit will be illegal as of [*insert date specified in Section *9(c)*], and a copy of the final documents that will be submitted pursuant to Section [____ (*10)] of this [article / chapter]. These final designations may differ from the proposed designations on which tenants were invited to comment.

(7) A Unit in a Rental Complex for which a Landlord is required to submit information pursuant to Section [____ (*10)] of this [article / chapter] but for which such information, for any reason, is not fully and timely submitted is hereby designated as a nonsmoking Unit as of [*insert effective date of ordinance + 120 days*].

Sec. [____ (*7)]. REQUIRED AND IMPLIED LEASE TERMS FOR ALL NEW AND EXISTING UNITS IN RENTAL COMPLEXES.

COMMENT: This section requires that Smoking restrictions be included as part of the lease. Note that the term "Unit" includes the defined term "New Unit," so whenever the term Unit is used in the ordinance, it includes *all* Units, both existing and new.

By including these provisions in lease agreements, Landlords may enforce the Smoking restrictions just like any other condition in the lease, such as common provisions regarding noise, use of laundry facilities, and damage to common areas. Further, by including the "third-party beneficiary" provision, other tenants will be able to enforce a lease's Smoking restrictions. The Landlord and other tenants become an alternate enforcement authority for the Smoking restrictions in addition to possible local government enforcement of the law (see Section *12 Enforcement) and optional private citizen enforcement (see Section *13 Private Enforcement).

Note also that after a Landlord amends an existing rental agreement or enters into a new lease to include these required terms, Smoking in violation of those terms becomes illegal pursuant to Section *9, and not just a material breach of the lease.

(a) Every lease or other rental agreement for the occupancy of a Unit in a Rental Complex, including, for example, New Units and existing Units, entered into, renewed, or continued month-to-month after [*insert effective date of ordinance*], shall include the provisions set forth in subsection (b) below on the earliest possible date when such an amendment is allowable by law when providing the minimum legal notice.

COMMENT: This provision calls for the Landlord to amend a rental agreement at the first opportunity. It is also designed to provide tenants with adequate legal notice of the pending change in their lease terms. The overall objective is to insert the new terms into every lease within one year after the effective date of ordinance (assuming leases are for one year or less).

(b) Every lease or other rental agreement for the occupancy of a Unit in a Rental Complex, including, for example, New Units and existing Units, entered into, renewed, or continued month-to-month after [*insert effective date of ordinance*], shall be amended to include the following provisions:

COMMENT: The following subsections contain both an explicit directive regarding the *legal effect* the required clause must achieve followed by an example clause based on the directive. Because leases vary in terms, format, and language, it is not possible to provide verbatim wording that can be easily dropped into any lease. These clause requirements provide a Landlord with needed flexibility to conform an existing lease while using terms consistent with the rest of the lease. In many cases, a Landlord can probably just use the example language provided with minimal changes.

(1) A clause providing that as of [*insert effective date of ordinance + one year*], it is a material breach of the agreement to allow or engage in Smoking in the Unit unless the Landlord has supplied written notice that the Unit has not been designated a nonsmoking Unit and no other prohibition against Smoking applies. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in the unit as of [*insert effective date of ordinance + one year*] unless landlord has provided written notice that the unit has not been designated a nonsmoking unit and smoking in the unit is not otherwise prohibited by this agreement, other agreements, or by law.”

(2) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant or present by invitation or permission of the tenant to engage in Smoking in any Common Area of the property other than a designated Smoking area. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any common area of the property, except in an outdoor designated smoking area, if one exists.”

(3) **A** clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating Smoking while anywhere on the property. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating smoking while anywhere on the property.”

(4) **A** clause expressly conveying third-party beneficiary status to all occupants of the Rental Complex as to the Smoking provisions of the agreement. Such a clause might state, “Other occupants of the property are express third-party beneficiaries of those provisions in this agreement that concern smoking. **As** such, other occupants of the property may seek to enforce such provisions by any lawful means, including by bringing a civil action in a court of law.”

COMMENT: Declaring other residents third-party beneficiaries grants people living in the Rental Complex limited rights to enforce the Smoking restrictions in leases. Without the declaration, other residents usually have no legal right to enforce the lease terms (because they are not a “party” to the agreement) and the power to enforce the terms of the lease rests solely with the Landlord.

(c) Whether or not a Landlord complies with subsections (a) and (b) above, the clauses required by those subsections shall be implied and incorporated by law into every agreement to which subsections (a) or (b) apply and shall become effective as of the earliest possible date on which the Landlord could have made the insertions pursuant to subsections (a) or (b).

COMMENT: This is a back-up provision to ensure that the Smoking-related terms are included by law, even if the Landlord fails to comply with subsections (a) or (b).

(d) **A** tenant who breaches a Smoking provision of a lease or other rental agreement for the occupancy of a Unit in a Rental Complex, or who knowingly permits any other Person subject to the control of the tenant or present by invitation or permission of the tenant, shall be liable for the breach to: (i) the Landlord; and (ii) any occupant of the Rental Complex who is exposed to Smoke or who suffers damages as a result of the breach.

COMMENT: This provision provides other tenants legal standing to seek damages or possibly an injunction against someone Smoking in violation of a lease term.

There are two additional enforcement mechanisms in this ordinance:

Section *12 “Enforcement” provides for traditional enforcement by local government officials.

Section *13 “Private Enforcement” grants **any** member of the public the right to enforce the ordinance. Thus, a Landlord, a tenant, or a member of the public could bring a lawsuit to enforce the ordinance in either Superior Court or small claims court if Section *13 is included.

(e) This [article/ chapter] shall not create additional liability in a Landlord to any Person for a tenant's breach of any Smoking provision in a lease or other rental agreement for the occupancy of a Unit in a Rental Complex if the Landlord has fully complied with this Section and Section [__ (*6)].

COMMENT: This provision expressly states that the Landlord is not the guarantor of the ordinance's enforcement. That is, the Landlord is not contractually required to enforce the no-Smoking lease terms and other residents cannot force the Landlord to act against a tenant who violates one. Including this provision can be extremely important in efforts to gain Landlord support for the ordinance.

(f) Failure to enforce any Smoking provision required by this [article / chapter] shall not affect the right to enforce such provision in the future, nor shall a waiver of any breach constitute a waiver of any subsequent breach or a waiver of the provision itself.

COMMENT: This is a technical legal provision designed to prevent a court from inferring a permanent waiver of a Smoking-related

Sec. [____ (*8)]. ADDITIONAL DUTIES OF A LANDLORD OF A RENTAL COMPLEX WITH LESS THAN ONE HUNDRED PERCENT (100%) NONSMOKING UNITS.

A Landlord of a Rental Complex with less than one hundred percent (100%) nonsmoking Units shall provide to every prospective tenant, prior to entering into a new lease or other rental agreement for the occupancy of a Unit in a Rental Complex, a copy of the designation documents submitted pursuant to Section [____ (*6)] describing each designated nonsmoking Unit with an accompanying diagram depicting the location of nonsmoking Units in relation to all other Units and any designated Smoking areas.

COMMENT: This section requires the Landlord to notify prospective tenants of the location of nonsmoking Units to Units where Smoking may be permitted. It does not require the Landlord to inquire as to any tenant's personal Smoking habits. Instead, the Landlord merely identifies for prospective tenants which Units allow Smoking and which do not.

If the community decides to make 100% of existing Units in Rental Complexes nonsmoking with no Landlord election, this Section can be omitted.

Sec. [____ (*9)]. SMOKING PROHIBITED BY LAW IN CERTAIN AREAS.

COMMENT: This section consolidates the actual Smoking prohibitions. Rather than state that Smoking is prohibited numerous times in various sections of the ordinance, those sections simply refer the reader to this Section *9. One benefit of consolidation is a uniformity of the Smoking prohibitions between sections.

(a) Smoking in a Common Area, on or after [*insert effective date of ordinance*], other than in a designated Smoking area established pursuant to Section [____ (*2)], is a violation of this [article / chapter].

(b) Smoking in a New Unit, on or after [*insert effective date of ordinance*], is a violation of this [article / chapter].

(c) Smoking in a designated nonsmoking Unit, on or after [*insert effective date of ordinance* + *1 year*], is a violation of this [article / chapter].

(d) No Person shall engage in Smoking in any Nonsmoking Area.

COMMENT: Note that whenever a lease contains a no- Smoking term, this provision makes Smoking in such a Unit *against the law* in addition to being a violation of the lease. This provision also applies to any nonsmoking rules or CC&Rs for a Common Interest Complex.

Thus, when a Landlord amends an existing rental agreement or creates a new one to include the lease terms required by Section *7, Smoking in violation of those lease terms then becomes illegal, not just a lease violation.

(e) No Person with legal control over any Nonsmoking Area shall permit Smoking in the Nonsmoking Area, except as provided in Section [____ (*7)(e)].

COMMENT: This provision makes Smoking in a nonsmoking area or Unit against the law, even if an area is made nonsmoking only by a lease term (rather than an ordinance, for example). It also makes a tenant responsible for Smoking by his or her guests. The exception refers back to the subsection limiting a Landlord's liability for a tenant's breach of a no-smoking term.

Sec. [____ (*10)]. PROCEDURES AND REQUIREMENTS FOR MANDATED SUBMISSIONS.

(a) Submissions required by this [article / chapter] must be received by [*insert the municipal office or official who will administer the record-keeping requirements of the ordinance*] on or before any applicable due date. The submissions shall include all material and information required by this [article / chapter] and such other materials and information as [*insert the designated municipal office or official*] deems necessary for the administration and enforcement of this [article / chapter].

COMMENT: The community should fill in the blanks with the appropriate office, official, or department that can accommodate the record-keeping requirements of this ordinance and that can handle the anticipated requests from the public for access to the information. Communities will likely differ as to which department is best suited to fill this role.

(b) All material and information submitted pursuant to this [article / chapter] constitute disclosable public records and are not private or confidential.

Sec. [____ (*11)]. SMOKING AND SMOKE GENERALLY.

(a) The provisions of this [article / chapter] are restrictive only and establish no new rights for a Person who engages in Smoking. Notwithstanding (i) any provision of this [article / chapter] or other provisions of this Code, (ii) any failure by any Person to restrict Smoking under this [article / chapter], or (iii) any explicit or implicit provision of this Code that allows Smoking in any place, nothing in this Code shall be interpreted to limit any Person's legal rights under other laws with regard to Smoking, including, for example, rights in nuisance, trespass, property damage, and personal injury or other legal or equitable principles.

COMMENT: The subsection spells out that the intent of this ordinance is to create new smokefree areas and to enhance the right of nonsmokers to smokefree environments. This ordinance does not provide smokers with any "safe harbors" from existing laws that might already impose potential liability for Smoking.

Subsection (a) *does not* expand traditional nuisance law in any way, and should generally be included in all ordinances based on this model. Subsection (c) below does potentially expand traditional nuisance law.

(b) Notwithstanding any other provision of this [article / chapter], Smoking marijuana for medical purposes as permitted by California Health and Safety Code sections 11362.7 *et seq.* is not prohibited by this [article / chapter].

(c) For all purposes within the jurisdiction of the [City / County of ____], nonconsensual exposure to Smoke [occurring on or drifting into residential property] is a nuisance, and the uninvited presence of Smoke on [residential] property is a nuisance and a trespass.

COMMENT: The declaration in subsection (c) that Smoke is a nuisance extends far beyond the residential context, unless limited by including the optional language in brackets. Once Smoke is declared a nuisance, nuisance abatement laws can be used to address Smoke around doorways, at businesses, in public venues, and anywhere else it may occur. However, declaring Smoke a nuisance is particularly helpful in the housing context because it eliminates the need to prove that some particular level of exposure has occurred and then to prove that such exposure is an unjustified intrusion or hazard.

California Government Code section 38771 explicitly authorizes cities to declare nuisances by ordinance. Counties may declare a nuisance pursuant to the broad police power set forth in the California Constitution, article XI, section 7.

Sec. [____ (*12)]. PENALTIES AND ENFORCEMENT.

(a) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: The following provisions are designed to offer a variety of options to the drafter and to the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use in any given case. As a practical matter, these enforcement options would not be applied in a single case, although multiple remedies might be used against a particularly egregious violator over time.

(b) Every instance of Smoking in violation of this [article / chapter] is an infraction subject to a [one hundred dollar (\$1 00)] fine. Other violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this chapter shall be the responsibility of []. In addition, any peace officer or code enforcement official also may enforce this chapter.

COMMENT: The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed \$100 for a first infraction. (See California Government Code section 36900.) It is separated from the main enforcement provision that follows so that law enforcement officers can simply write a ticket for illegal Smoking. The second sentence, sometimes called a “wobbler,” affords the prosecuting attorney discretion whether to pursue a violation as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a \$1,000 fine and/or six months in County Jail). Alternatively, violations can be set as either an infraction or a misdemeanor in all circumstances. Misdemeanors are more serious crimes for which a jury trial is available to defendants. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

This provision also designates a primary enforcement agency, which is recommended, but remains flexible by permitting any enforcement agency to enforce the law.

(c) Violations of this [article / chapter] are subject to a civil action brought by the [City / County of], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision provides civil fines for violating the ordinance. It requires that a traditional civil suit be filed by the city or county (possibly in small claims court). The fine amounts can be adjusted but cannot exceed \$1,000 per violation. (See California Government Code section 36901.)

(d) No Person shall intimidate, harass, or otherwise retaliate against any Person who seeks compliance with this [article / chapter]. Moreover, no Person shall intentionally or recklessly expose another Person to Smoke in response to that Person’s effort to achieve compliance with this [article / chapter]. Violation of this subsection shall constitute a misdemeanor.

(e) Causing, permitting, aiding, or abetting a violation of any provision of this [article / chapter] shall also constitute a violation of this [article / chapter].

COMMENT: This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

(f) Any violation of this [article / chapter] is hereby declared to be a public nuisance.

COMMENT: By expressly declaring that a violation of this ordinance is a nuisance, this provision allows enforcement of the ordinance by the city or county via the administrative nuisance abatement procedures commonly found in municipal codes.

Note that this declaration merely says that violating the ordinance qualifies as a nuisance (e.g., when Smoking in a nonsmoking area, the violation **is** the nuisance, not the Smoke). It is not the same thing as a local ordinance declaring Smoke a nuisance. Please see Section *11(c) for the declaration that nonconsensual exposure to secondhand is a nuisance.

(g) In addition to other remedies provided by this [article / chapter] or otherwise available at law or in equity, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, without limitation, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

COMMENT: It is common to provide that the local government's lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal.3d 63 (1983).

A public agency should think carefully about the nuisance abatement procedure it chooses in enforcing this ordinance after it is adopted. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.7. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 and Health & Safety Code section 17980. Government Code section 38773.5 establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

[(h) Any Person, including a legal entity or organization, acting for the interests of itself, its members, or the general public may bring a civil action for injunctive relief to prevent future such violations or sue to recover such actual or statutory damages as he or she may prove.]

COMMENT: If Section *13 "Private Enforcement" is not included, consider including this simple provision, which provides a far more limited type of private enforcement. If Section *13 is included, this provision should be omitted.

[(i) Except as otherwise provided, enforcement of this [article / chapter] is at the sole discretion of the [City / County of ____]. Nothing in this [article / chapter] shall create a right of action in any Person against the [City / County of ____] or its agents to compel public enforcement of this [article / chapter] against private parties.]

COMMENT: This is an optional provision, which makes clear that a City or County cannot be liable to any Person for failure to enforce the Smoking restrictions in this ordinance.

Sec. [____] (*13)]. PRIVATE ENFORCEMENT.

COMMENT: This “Private Enforcement” provision makes it possible for any member of the public to sue violators of this ordinance. This “private right of action” section provides an avenue for private persons to file suit. Such a right was curtailed after the passage of Proposition 64 in November 2004, which prohibited the use of California Business and Professions Code section 17200 by private persons to file suits on behalf of the public. However, nothing in Proposition 64 prohibits local governments from creating a private right of action to enforce violations of local law.

Note that although this section is titled “Private Enforcement,” the city or county itself can also use these provisions if it deems them preferable to other enforcement options or if it seeks to impose additional sanctions.

For further explanation of the rationale behind and potential impact of this provision, please see TALC’s memorandum entitled “The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances” available from our website at www.phlpnet.org/tobacco-control.

If this “Private Enforcement” provision is not included, consider including the optional language in Section *12(h).

(a) Any Person, including a legal entity or organization or a government agency, acting for the interests of itself, its members, or the general public may bring a civil action to enforce this [article / chapter]. Upon proof of a violation, a court shall award the following:

COMMENT: This provision allows a Person to sue a violator if the Person has been personally harmed or if the Person wants to act as a private attorney general by holding the violator accountable on behalf of the general public.

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, \$[500] for each violation of this [article / chapter] (hereinafter “Statutory Damages”). Each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this [article / chapter], no Person suing on behalf of the general public shall recover Statutory Damages based upon a violation of this [article / chapter] if a previous claim brought on behalf of

the general public by another Person for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Person bringing the subsequent claim was a party to the prior adjudication.

COMMENT: This provision allows for the collection of damages even if it is difficult or impossible to prove the actual amount of damages resulting from a given violation. Statutory damages can add up to a substantial sum because each day of a continuing violation is a separate violation. However, if an action is brought in small claims court, the total amount of damages sought must fall below \$5,000 (or \$7,500 if the small claims suit is brought by a natural person). So, when considering the amount at which to set statutory damages, it is worth considering whether a typical case brought under the ordinance will involve a claim for less than \$5,000 (or \$7,500). Note that this provision protects a person from being sued multiple times on behalf of the general public for the same violation and must do so to prevent the ordinance from being challenged as unconstitutionally punitive.

(2) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, retaliation, or a conscious disregard for the public health.

COMMENT: Exemplary damages are also known as *punitive damages*. They are designed to punish and deter a defendant in a tort case who has acted in an outrageous manner.

(b) The Person may also bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

COMMENT: In order to get an injunction, a plaintiff would have to sue in another division of superior court and not the small claims division. However, a plaintiff could seek a conditional judgment in small claims court. Note that the difference between an injunction and a conditional judgment is that with the former, the defendant is directly ordered to do something (or to refrain from doing something). With a conditional judgment, however, the defendant is given a choice between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See 1 *Consumer Law Sourcebook: Small Claims Court Laws and Procedures* (California Department of Consumer Affairs 2005).) A conditional judgment could serve as an alternative to damages, or it could be in addition to damages. For example, a small claims court could order some monetary damages along with a conditional judgment giving the defendant a choice between stopping the violations or paying even more money.

(c) Notwithstanding any legal or equitable bar against a Person seeking relief on its own behalf, a Person may bring an action to enforce this [article / chapter] solely on behalf of the general public. When a Person brings an action solely on behalf of the general public, nothing about such an action shall act to preclude or bar the Person from bringing a subsequent action based upon the same facts but seeking relief on his, her or its own behalf.

COMMENT: This is an important clause, so exercise care when considering whether to modify or eliminate it. This clause accomplishes two distinct goals:

First, the clause permits a Person with a special relationship to a particular defendant to sue the defendant even though the Person might otherwise be prohibited from doing so. Attorneys often refer to such prohibitions as legal *and* equitable bars. For example, a tenant may be required to arbitrate—not litigate—any disputes, such as a dispute involving Smoking in a Multi-Unit Residence. Under this clause, a tenant may be required to arbitrate any personal claims (e.g., damages for personal injury from Smoke) but can nevertheless sue the tenant violating the ordinance in court as a representative member of the general public. In such a circumstance, the Person could only make the claims that every member of the general public could make (e.g., sue for Statutory Damages on behalf of the general public for a violation of this ordinance).

Second, the clause permits a Person who first sues solely on behalf of the general public to sue the same defendant later on any personal claims (although such personal claims might still be subject to legal or equitable bars as described above). Normally, repetitive suits based upon essentially the same facts and circumstances are prohibited. Attorneys often use the terms *res judicata*, collateral estoppel, or issue *or* claim preclusion for such prohibitions. Under this clause, however, a tenant subjected to Smoking in a Multi-Unit Residence can first sue the tenant violating the ordinance solely on behalf of the general public, receiving the statutory damages amount for each violation. If the tenant is made ill by the Smoke, she can sue the violating tenant later for personal injury.

This clause is not intended to modify well-established legal rules concerning when a plaintiff may bring personal claims. Rather, it simply reflects the reasoning that when a Person brings a claim solely on behalf of the general public, the plaintiff is acting as a private attorney general; thus, the existence of personal claims is irrelevant and such claims are unaffected.

(d) Nothing in this [article / chapter] prohibits a Person from bringing a civil action in small claims court to enforce this [article / chapter], so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of that court.

COMMENT: This clause is legally superfluous, but it serves to flag for plaintiffs and courts that small claims court would be an appropriate forum for resolving disputes under this provision.

SECTION 11L. CONSTRUCTION, SEVERABILITY.

It is the intent of the [City Council / Board of Supervisors] of the [City / County] of [] to supplement applicable state and federal law and not to duplicate or contradict such law and this Ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections,

subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [—] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

COMMENT: This is standard language. Often this "boilerplate" is found at the end of an ordinance, but its location is irrelevant.